

The Responsibilities and Rights of Both Buyer and Seller in International Trade Concerning the Conformity of the Goods and Additional Contractual Requirements

Pro gradu -tutkielma

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Index of Abbreviations

Amtsgericht (German Petty Court)	AmG
Appellate Court	AC
Appellationsgericht (Swiss Appellate Court)	AG
Appellationshof (Swiss Appellate Court)	AH
Article	Art.
Bundesgericht (Swiss Supreme Court)	BG
Bundesgerichtshof (German Supreme Court)	BGH
Chapter	Ch.
China International Economic and Trade Arbitration Commission	CIETAC
Commercial Court	CC
Cour de Cassation (French Supreme Court)	CdC
Cour d'appel (French Appellate Court)	CA
District Court	DC
Gerechtshof (Dutch Appellate Court)	GH
Handelsgericht (Swiss Commercial Court)	HG
Ibidem (Same as Above)	Ibid.
International Chamber of Commerce	ICC
International Institute for the Unification of Private Law	Unidroit
In the above text	Supra
Landgericht (German District Court)	LG
Obergericht (Swiss Appellate Court)	OG
Oberlandesgericht (German/Austrian Appellate Court)	OLG
Oberster Gerichtshof (Austrian Supreme Court)	OGH

Page/Pages	p. / pp.
Paragraph/Paragraphs	para. / paras.
United Nations Convention on Contracts for the International Sale of goods	CISG
United States of America	US
Zivilgericht (Swiss Civil Court)	ZG

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Introduction

Trading has been around since time immemorial. There have always been parties that possess something that other parties need or want. The purpose of the United Nations Convention on Contracts for the International Sale of Goods (CISG) was to create an equal playing field between parties that operate under different jurisdictions, different conditions and legislations. The CISG was to act as a rulebook in international trade, one that sets in proverbial stone the guidelines and rules for parties selling and buying.

The CISG effectively establishes obligations on both parties, not just the seller. In this regard, this research is aimed at studying the rights and responsibilities of both the buyer and the seller as imposed by the articles of the CISG. However, the text of the CISG alone is at times insufficient in clarifying the correct interpretation of a contractual dispute. As such, at times of dispute, courts and arbitral tribunals may need to resort to secondary informative sources to determine the actual content of the parties' obligations. Such secondary sources are, first and foremost, the rulings of national courts and international arbitral tribunals that sometimes find themselves in a position where interpretation of the CISG is required. Moreover, scholarly opinions may also be considered as secondary sources. However, it is important to remember that none of those secondary sources are formally binding, they simply assist the relevant authority in their decision-making. Accordingly, this research paper will also make use of such sources in order to establish the prevailing views with regard to conformity requirements and rightful expectations of the parties.

The obligations of both parties have effectively developed with time and there are increasingly more requirements that the parties need to be aware of and take into consideration. Whereas before, it was sufficient for a buyer to receive a certain good without any additional obligations imposed on the seller; now, the buyer may for instance require the seller to obtain the good from a specific source, manufacture the good in a certain way or produce the good using certain specific materials.

The parties may be driven by various motives such as social responsibility or environmental awareness. For instance, the buyer might find it of great importance that no actual animal testing occurs in the manufacture of the goods it ordered. Such a requirement may even refer to the entire business operation of the seller, although in such situations, it would be recommendable to specify that requirement to the seller in

order to prevent any misunderstandings. On the other hand, it may, for example, be crucial to the seller for the buyer to not resell the goods to a certain location, such as a country where the seller's country has declared a trade embargo.

Contractual obligations and the expectations of the parties have effectively evolved. Such concerns now need to be taken into consideration when drafting contracts. Consequently, these concerns may later need assessment if the parties have collided into a dispute that needs resolution. In such situations, much is left to be determined: How did the parties make their expectations known? How did they abide by the agreed contractual obligations? Was there ever a violation of a contractual obligation? Did the aggrieved party ever make its expectations sufficiently known to the other party? Were the parties' expectations reasonable under the circumstances?

This research paper now ventures to investigate the obligations and expectations, both just and unjust, of the parties in international trade, following a brief mandatory explanation of the concept of conformity.

What is Conformity?

The concept of conformity is essentially defined by Article 35 of the CISG in its entirety. The article defines conformity as the nature of the goods that the buyer is entitled to expect based on contractual definitions, pre-contractual negotiations and the buyer's purpose for the goods made known to the seller before the conclusion of the contract.¹ Conformity relates to the goods themselves in one way or another, but there are instances where the seller may have breached the contract even though the goods that it delivered were in conformity with the contractual terms.² Such situations will also be discussed in the following chapters of the text, as a simple contractual breach is, on many occasions, a more preferable approach compared to the artificial argument that the seller must have delivered non-conforming goods even though the tangible quality of the delivered goods was effectively without fault.

In assessing the conformity requirements imposed on the ordered goods, the first paragraph of Article 35 establishes that “the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.”³ The interpretation of the content of this article will be discussed further in the following chapters, but the first paragraph sets up the primary basis for determining the conformity requirements for the goods.⁴

Conformity is initially and mainly defined by the terms of the contract itself.⁵ However, pursuant to Article 8 of the CISG, contractual stipulations may be supplemented with additional information that is not specifically incorporated in to the contract document itself. To this effect, the main purpose of Article 8 is to aid in the interpretation of a disputed contractual clause.⁶ The third paragraph of Article 8 is especially relevant. It states that:

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have

¹ Art. 35 CISG

² Schwenzler/Leisinger, p. 268 in stating that; *Even if one finds that violation of ethical standards does not result in non-conformity of the goods in accordance with Article 35 CISG, if compliance with certain standards is a duty resulting from the contract, any non-compliance amounts to a breach of contract, giving rise to all remedies that are not specifically limited to cases of non-conformity.*

³ Art. 35(1) CISG

⁴ Enderlein/Maskow, p. 141

⁵ Ibid.

⁶ Henschel, Ch. 4.1; Neumann, para. 5

*established between themselves, usages and any subsequent conduct of the parties.*⁷

Accordingly, any additional information that was available to the parties prior to the conclusion of the contract is pertinent in assessing the conformity requirements set for the goods.

The second paragraph of Article 35 contains secondary norms to be used in determining the conformity requirements for the ordered goods.⁸ It creates basic requirements for the goods that are either typically expected of such goods or specifically expected by the buyer in situations where the buyer has made such an expectation known to the seller.

Article 35(2) CISG states that:

*Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) Are fit for the purposes for which goods of the same description would ordinarily be used; (b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.*⁹

Lastly, the third paragraph of Article 35 contains a notion that the buyer may not rely on the aforementioned paragraphs relating to the conformity of the goods in situations where the buyer either knew, or could not have been unaware, of the imminent nonconformity of the ordered goods.¹⁰

Failure on the seller's part to deliver conforming goods is uniformly understood as the seller having breached the contract, thus giving rise to all relevant remedies on the buyer's part.¹¹ However, the commercial court of Zürich has confirmed that in situations where the goods delivered by the seller are of the same value and usability to the buyer as conforming goods would have been, the seller has not necessarily breached the contract regardless of whether or not goods were effectively nonconforming.¹²

⁷ Art. 8(3) CISG

⁸ Enderlein, pp. 156-157; Neumann, para. 6; Schlechtriem, p. 6-20

⁹ Art. 35(2) CISG

¹⁰ Art. 35(3) CISG

¹¹ BGH, 8.3.1995; LG Paderborn, 25.6.1996

¹² HG Zürich, 30.11.1998

Given all of the above, the term nonconformity relates to the goods themselves. Although goods may be nonconforming with the contract even if they are free of any tangible defects, the concept of conformity is still somewhat limited as a distinct relationship between the goods and the seller's conduct is required in order for seller to have delivered nonconforming goods.

It is important to note that a seller may have breached the contract even in a situation where the requirements for the conformity of the goods pursuant to Article 35 are met.¹³ Such situations also need assessment to clarify the full range of remedies that are available to the buyer when the seller has not conducted its business in accordance with contractual requirements.

The purpose of this research paper is not to simply investigate the position of the buyer and situations where the buyer is entitled to pursue contractual remedies. In the following chapters, the buyer's obligations will also be covered thoroughly. It is pertinent to understand that the buyer may have a varying extent of obligations that are determined on a case-by-case basis, depending on the prevailing circumstances at the time of the conclusion of the contract. Moreover, the seller's position will likewise be addressed.

¹³ Schwenger/Leisinger, p. 268

The Purpose of the Research (Scope and Limitations)

This research paper intends to investigate the responsibilities of both parties in international trade. Although the main focus of the paper is directed at Article 35 of the CISG, it will also venture beyond that to ascertain the effects of additional contractual requirements that do not necessarily lead to the non-conformity of the goods yet nevertheless lead to a contractual violation that, in turn, activates the aggrieved party's contractual remedies pursuant to the relevant articles of the CISG.

The text will focus on contracts that are governed by the CISG, be it through the will of the parties or through a private international law analysis that leads to the application of the CISG as the relevant legislation.

The paper will proceed step-by-step through the paragraphs of Article 35, studying the duties of both the buyer and the seller as imposed by the CISG. The author will also make some personal comments regarding the prevailing interpretations of the various paragraphs of the article. Particularly, the current broad concept of quality under Article 35(1) will be discussed. It is the author's opinion that the scope of Article 35 has expanded during the years leading to a point where it is effectively being used as a catch-all of contractual violations. Whether or not such an approach is to be endorsed will be addressed in detail. The paper is also aimed at discussing contractual violations beyond the concept of nonconformity. Additionally, the buyer's duties in examining the delivery and notifying the seller of a discovered defect pursuant to Articles 38 and 39 of the CISG will be covered.

The use of remedies itself, by either party, pursuant to the various articles of the CISG will not be addressed in this research. This is for the simple reason that in doing so, the author can then focus more extensively on the issues already stated above.

Chapter 1

Contractual Obligations and Rightful Expectations in Relation to Article 35(1) of the CISG

1.1 Ascertaining the Expectations of the Parties

The first paragraph of Article 35 sets forth the primary basis for the evaluation of conformity requirements that are imposed on the ordered goods.¹⁴ The delivered goods must effectively be of the quantity, quality and description as determined in the contract.¹⁵ Therefore, the contract itself is the primary tool in ascertaining the expectations of the parties. Buyers are expected to make known their motives and goals in order for the seller to take these concerns into consideration when fulfilling its part of the bargain. A buyer should make use of contractual stipulations in order to define the expected qualities and quantity of the goods in question. In this regard, the contract could, for example, call for the delivery of silk, which will be used for the manufacture of shirts. This contractual clause might alone be sufficient for the seller to deliver conforming goods.

However, the contract document itself is not the sole device in determining contractual obligations, but, as already stated, contractual expectations are to be defined with regard to Article 8 of the CISG, as well as the additional paragraphs of Article 35, through which the buyer's ordinary and particular purpose for the goods may also be taken into consideration. Contracts may, at times, contain vague clauses; Parties may even expect certain qualities from the ordered goods or certain conduct of the counterparty even when the contract document itself is void of any such expectations. To this regard, Article 8 of the CISG, which is applied in situations where the interpretation of a contractual obligation is under dispute,¹⁶ relieves the parties of the burden of stipulating every contractual expectation in the contract document itself. It effectively enables additional information to be taken into consideration when ascertaining actual contractual obligations.

With regard to the example above, the contract could then simply call for the delivery of textiles for the manufacture of shirts. However, during the contractual negotiations, the buyer could have provided more information to the seller regarding the textiles that was

¹⁴ Enderlein/Maskow, p. 141

¹⁵ Art. 35(1) CISG

¹⁶ Zeller, p. 631; Zuppi in Kröll/Mistelis/Perales Viscasillas, p. 143, para. 3

not specifically incorporated into the contract document itself. During the negotiations, the buyer could have, for example, stated that by 'textiles' the buyer was, in fact, referring to silk. This notification should then be taken into consideration by the seller, regardless of whether or not that expectation was added to the contract document.

The contract and the additional information available to the parties at the time of the conclusion of the contract are then the principal instruments in determining whether a seller has delivered nonconforming goods or if the buyer had simply failed to sufficiently define the contractual purchase. In cases of the latter, the seller should not be held responsible.

In a case tried in the district court of Paderborn in Germany, the court held that the blinds purchased by a German customer from a French seller were not in conformity with the terms of the contract pursuant to Article 35(1) CISG since the blinds lacked the necessary amount of titanium dioxide. This is a required substance that ensures the effectiveness of the blinds against sunlight.¹⁷ In that particular instance, it had been contractually agreed that the blinds would contain the prerequisite amount of titanium dioxide. By failing to adhere to this requirement, the seller delivered nonconforming goods.¹⁸ By defining the goods that it required in sufficient detail, the buyer ensured that the seller's failure to meet the agreed upon terms would translate into a breach of the contract.

Similarly, in a case tried in the Swiss Supreme Court, it was found that the seller had breached the contract pursuant to Article 35(1) by failing to deliver goods of the correct quantity. The parties agreed upon the delivery of a certain amount of cable drums and the seller's failure to meet the exact number of cable drums was deemed a violation of the contract.¹⁹

In reference to the above two instances, whenever the parties have precisely agreed on the delivery of goods of a certain quality or quantity, the seller's failure to meet the agreement is equated to a breaching of the terms of the contract pursuant to Article 35(1) of the CISG. The buyer effectively reinforces its position by carefully drafting the contract and including information that is vital to ensure the delivery of suitable goods.

¹⁷ LG Paderborn, 25.06.1996

¹⁸ Ibid.

¹⁹ BG, 7.7.2004

Contrary to the previous two cases, in the *New Zealand Mussels case* tried in the German Supreme Court, the buyer failed to define the ordered goods in sufficient detail. In that instance, a German buyer ordered mussels from a Swiss seller. The delivered mussels failed to meet the recommendations set forth by the German health authority, due to which the buyer subsequently claimed nonconformity of the delivered mussels. Contrary to the buyer's claims, the Court stated that the seller should not be held responsible for ascertaining the relevant public law standards when those standards are different from those in the seller's place of business. The buyer was consequently held responsible for not informing the seller of these health standards. As a result, the Court found no violation of the contract with regard to Article 35(1) of the CISG.²⁰ As far as the seller was concerned, it had delivered goods that were in accordance with the quality stipulated in the contract.

Depending on the situation, the buyer may be obligated to relay information to the seller to various extents. In the *New Zealand Mussels case*, the buyer was deemed to be in a better position to inform the seller of the prevalent health regulations in its place of operation, and so the Court found it unreasonable to require the seller to ascertain such information when the other party was already in the know.

To clarify the importance of Article 8 of the CISG in connection with ascertaining conformity requirements set for ordered goods, Dr. Bruno Zeller's opinion may be of some help. According to Dr. Zeller, "Article 8 is relevant as soon as a question of intent arises. In other words, if there is a real or perceived misunderstanding between the parties, Article 8 must be consulted to elicit the true intent."²¹ Accordingly, if the parties have made their contractual expectations explicitly clear, there would be no need to resort to Article 8.

1.1.1 The Intent of the Parties

Although it may seem that Article 35(1) creates obligations solely on the seller in stating that the seller must deliver goods of the correct quantity, quality and description as agreed upon, it also relegates to the buyer a responsibility to establish the definition of 'correct' with regard to the quality, quantity and description that it expects. To this extent, the buyer's actual and assumed intent is of foremost importance. This sentiment is supported by scholar Kristian Maley, according to whom "conformity is essentially a

²⁰ BGH, 8.3.1995

²¹ Zeller, p. 631

description of the extent to which the goods concord with the parties' actual intent and presumed intent."²²

The crux of the issue of contractual obligations then relates to the intent of the parties at the time of the conclusion of the contract. If the buyer has made its expectations sufficiently known regarding the quality of the goods it expects, the quantity to be delivered and the conduct that is otherwise expected of the counterparty, then reference to Article 8 of the CISG is not necessary. Article 8 simply contains rules to resolve situations where the parties have clashing understandings regarding contractual obligations.²³ Professor Jacob Ziegel, in fact, specifically states that: "[Article] 8 is concerned with rules for determining the parties' intentions where their language or conduct is ambiguous or, *quaere*, where, to the knowledge of the other party, the first party was operating under a mistaken assumption of fact."²⁴ Accordingly, Article 8(1) of the CISG states that "for the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."²⁵

It is submitted that while the text of the article merely refers to 'statements' made by the parties, the article should also be applied when interpreting the contract as a whole or when interpreting separate contractual clauses.²⁶ It is clear that the primary obligation of any party with regard to the concept of nonconformity and contractual violations in international trade is to make their intent known to the other contracting party.²⁷ This is especially important in relation to the contracted goods and any extraordinary conduct that a buyer expects from a seller. Such action is recommended, for example, when the buyer expects that the seller adheres to ethical standards in the manufacture of the ordered goods.²⁸ As stated by Professor Ingeborg Schwenzer and Benjamin Leisinger:

*The first way to incorporate ethical standards into sales contracts is to stipulate that the seller, for example, has to abide by specific standards concerning human rights, labor conditions or the environment. By so doing, such norms become part of the contract and may be enforced, or their violation sanctioned, in the same way as with any other terms. It is highly advisable that the interested party insists on incorporating such express terms into the contract, in order to circumvent any later disputes in this respect.*²⁹

²² Maley, p. 83

²³ Zuppi in Kröll/Mistelis/Perales Viscasillas, p. 143, para. 3

²⁴ Ziegel, Art. 8, para. 1

²⁵ Art. 8(1) CISG

²⁶ BG, 22.12.2000; Huber, p. 235; Sun, p. 72; Zuppi in Kröll/Mistelis/Perales Viscasillas, p. 143, para. 2

²⁷ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 151, para. 10

²⁸ Schwenzer/Leisinger, p. 264

²⁹ Ibid.

Having made its intent clear, a party can rely on the fact that the counterparty may no longer argue that it was unaware of it.³⁰ In relation to Article 35(1) of the CISG, a buyer might, for instance, clarify to the seller that it wishes to purchase organic goods that need to have been manufactured in a certain manner. Insofar as this intent has been made sufficiently clear, the seller can no longer argue a different understanding. As regards the previous example of a textiles purchase, for as long as the buyer, in one way or another, informed the seller of the fact that it expected the delivery of silk for the manufacture of shirts and the seller either was aware, or at the very least could not have been unaware, of that expectation, the buyer can then justifiably expect the delivery of suitable silk or claim nonconformity of the delivered goods.

Article 8, however, reaches even beyond the aforementioned. For as long as the counterparty is aware of the intent, regardless of how it garnered such knowledge, it is then accordingly bound by that knowledge.³¹ Article 8(1) effectively acknowledges the difficulties that a party may encounter in attempting to establish that the counterparty was factually aware of its intent.³² A buyer may have taken a multitude of efforts in clarifying that it wished to purchase, for instance, organically manufactured products, yet that expectation may not have been written down in the contractual document itself. Establishing actual and definite knowledge of the seller in that situation may be impossible for the buyer, but the buyer may still argue that the seller could not have been unaware of buyer's intent.

Article 8 of the CISG provides the relevant authority, as well as the parties, with rules to resolve contractual disputes and differences regarding the interpretation of a contractual obligation.³³ Through the text of the article, the parties are encouraged to make their intent known to the other party, but the intent need not necessarily be written in the terms of the contract itself.

Party intent, and a shared intent at that, is naturally first sought to determine the correct interpretation of a contractual clause.³⁴ A shared intent, regardless of how unreasonable it is, will always prevail when ascertaining actual contractual obligations.³⁵ Only in a situation where a joint and shared understanding is not ascertainable would a court or an arbitral tribunal be in position where it might have to presume that the counterparty

³⁰ Enderlein/Maskow, p. 63

³¹ Ibid.

³² Farnsworth in Bianca/Bonell, p. 98, para. 2.3

³³ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 151, para. 10

³⁴ BG, 5.4.2005; HG Aargau, 5.2.2008; HG Aargau, 26.11.2008

³⁵ Lautenschlager, p. 260

could not have been unaware of the opposing party's expectations. When neither of the above options are applicable, the court would then have to resort to the complementary determination of what understanding a reasonable person would have had in that particular situation, in accordance with Article 8(2) of the CISG so as to determine the correct interpretation of a disputed contractual expectation.³⁶

As stated above, according to Article 8(3) of the CISG, any interpretation of a contractual obligation must be done with regard to all relevant information that was available to the parties at the time of the conclusion of the contract.³⁷ Therefore, the parties may inform the counterparty of any contractual expectations in any way, for as long as this is done before the conclusion of the contract. Naturally, any such expectations must be made known in sufficient detail in order from them to qualify as justifiable contractual obligations. In this context, Article 8(1) CISG specifically requires that the opposing party must either be aware of such expectations or at least be in a position where it should have been aware of the said expectations.³⁸ In these situations, the wording of Article 8(1) CISG is clear. The relevant authority, be it a court or an arbitral tribunal, is entitled to, until a certain point, presume a party to have been aware of the other party's intent and purpose for the contract.³⁹ To this effect, in a case tried in the Appellate Court of Grenoble, the seller had made it known to the buyer on multiple occasions that the contracted goods were to be resold either in South America or Africa. The buyer ignored this requirement and instead decided to resell the goods to Spain. The Court held that the buyer could not have been unaware of the seller's intent for the goods to be resold to a specified location and, by violating this requirement, the buyer had breached the contract between it and the seller.⁴⁰ The seller had brought forth its contractual expectations in a sufficient manner and could thus justifiably expect the buyer to adhere to them.

The party claiming that the counterparty either knew, or at the very least could not have been unaware, of its contractual expectations bears the burden of proof regarding such knowledge.⁴¹ In these scenarios, the asserting party should provide the court or arbitral

³⁶ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 156, para. 22; Zuppi in Kröll/Mistelis/Perales Viscasillas, p. 145, para. 7; AG Basel-Stadt, 26.9.2008; HG Aargau, 5.2.2008, HG Aargau, 26.11.2008, the commercial court stated that "should an actual concurrence of intent remain unproven in court, Art. 8(2) provides that a presumptive intent may be determined. For this purpose, the declarations of the parties must be interpreted according to their reasonable meaning in the light of wording, context and the principle of good faith."

³⁷ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 152, para. 13

³⁸ Art. 8(1) CISG

³⁹ CA Grenoble, 22.2.1995

⁴⁰ Ibid.

⁴¹ DC St. Gallen, 3.7.1997; Enderlein/Maskow, p. 63, para. 3.1

tribunal with enough evidence and argumentation to leave the court or arbitral tribunal in a position where it would feel comfortable in presuming that the counterparty could not have been unaware of such expectations.

It is the author's opinion that more demanding and unique contractual expectations require more precise notifications to the other party. This sentiment is also echoed in scholar Schwenger's writings, where she urges parties to specifically inform the counterparty of any requirements regarding expected ethical conduct.⁴²

With regard to the aforementioned, it ought to be stated that regarding the standard for presuming party knowledge in accordance with Article 8(1) of the CISG, scholarly writings separate this concept of 'could not have been unaware,' from the wording 'ought to have known,' which can also be found within the texts of the CISG. It is generally understood that the specific wording of 'could not have been unaware' requires a greater level of negligence on the counterparty's behalf.⁴³ In fact, Professor Peter Huber states that the phrase 'could not have been unaware' is comparative to 'gross negligence'.⁴⁴

1.1.2 The Understanding of a Reasonable Person

It is submitted that ascertaining actual party intent and the knowledge of the counterparty may, at times, prove to be a demanding, if not impossible, task. Therefore, paragraph two of Article 8 of the CISG is frequently resorted to.⁴⁵ Article 8(2) of the CISG states: "If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."⁴⁶

Although the second paragraph of Article 8 is numerically placed in a secondary position in terms of ascertaining party intent, it is submitted that in practice, it provides courts and arbitral tribunals the principal tool in determining the to-be-prevailing interpretation of a contractual obligation.⁴⁷ When resorting to Article 8(2) CISG, the

⁴² Schwenger/Leisinger, p. 264

⁴³ Schmidt-Kessel in Schlechtriem/Schwenger, p. 154, para. 17

⁴⁴ Huber, p. 236

⁴⁵ US Federal Appellate Court, 29.6.1998, (*MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*); Farnsworth in Bianca/Bonell, p. 98, para. 2.3; Honnold, p. 118, para. 107; Huber, p. 236; Lautenschlager, p. 261; Schmidt-Kessel in Schlechtriem/Schwenger, p. 155, para. 20

⁴⁶ Art. 8(2) CISG

⁴⁷ Farnsworth in Bianca/Bonell, p. 98, para. 2.3; Honnold, p. 118, para. 107; Huber, p. 236; Lautenschlager, p. 261; Schmidt-Kessel in Schlechtriem/Schwenger, p. 155, para. 20

court or arbitral tribunal must assess the understanding that a reasonable person in the position of the party receiving a statement or witnessing a certain act would have had.⁴⁸ In these situations, the parties need to prove that they have made their contractual expectations known in such a manner that a reasonable person would have understood those expectations based on the statements that were made and actions that were taken. Article 8(3) of the CISG is again of some relevance as all pertinent information must also be taken into consideration when determining the understanding that a reasonable person would have had.⁴⁹

The statements presented above are best simplified with the use of an example, wherein a buyer is particularly motivated by ethical standards. To discover suitable manufacturers to contract with, the buyer conducts ethical audits on potential candidates in order to ensure that the manufacturer fulfills all the necessary prerequisites, but the contract itself only contains a somewhat vague clause calling for the seller to adhere to common ethical standards in the manufacture of the ordered goods. It is the position of the author that in this scenario, it may be easily argued that the buyer could justifiably expect the manufacturer to adhere to the standards that have been raised in the ethical audit prior to the conclusion of the contract even when the contract itself is not similarly specific. In this particular scenario, the buyer could claim that the seller, by violating those standards in the manufacture of the ordered goods, has delivered goods that were not of the quality that the buyer was entitled to expect. As a result, the seller has violated Article 35(1) of the CISG.

The addressee, that is, the party arguing a different understanding of a contractual obligation, must establish two different factors in order for a tribunal or court to concur with its view of the obligations that had been imposed by the contract.⁵⁰ Firstly, it must be confirmed that the addressee was factually under a different understanding as to the contractual obligation. Secondly, the addressee would have to argue that a reasonable person in its position would have assessed the situation in a similar manner.⁵¹ Regarding the conformity of the goods, the buyer could, for instance, argue that it had made it clear to the seller that it wished to only purchase goods that had been manufactured organically. On the other hand, the seller could argue that it was under the understanding that the buyer was not concerned with how the particular goods were

⁴⁸ Farnsworth in Bianca/Bonell, p. 99, para. 2.4; Lautenschlager, p. 262

⁴⁹ Art. 8(3) CISG; Schmidt-Kessel in Schlechtriem/Schwenzer, p. 155, para. 21

⁵⁰ Farnsworth in Bianca/Bonell, p. 99, para. 2.4

⁵¹ Ibid.

produced. In situations like these, the seller needs to first establish that it was truly unaware of the buyer's intent. Moreover, it needs to prove that a reasonable person in its position, pursuant to Article 8(2) of the CISG, would have arrived at the same conclusion.

A court case from the Supreme Court of Switzerland may be referred to in order to further clarify the explanation given in the above paragraph. In that particular case, the contract concerned the delivery of a used textile machine. Following the delivery of the machine, the buyer discovered defects in the machine and claimed nonconformity of the goods pursuant to Article 35(1) of the CISG. The Supreme Court decided that because the machine had been built 14 years prior to the purchase and because the buyer was an expert in the field, the seller was entitled to expect inquiries from the buyer regarding the functioning of the machine. Without any distinct inquiries, the seller was justified in its expectations that the buyer wished to buy the machine in the condition that it was in at the time of purchase. Accordingly, the Court found that there had been no violation of Article 35(1) since the seller had been under the impression that the buyer explicitly wished to purchase a used machine. The Court also emphasized that the understanding of a reasonable person in the position of the seller would have been similar to the seller's, that is, that the buyer wished to purchase the used machine in the shape and form it was in at the time.⁵² In reference to the statements above, the Court first needed to establish that the seller was not, nor could it have been, aware of the intent of the buyer as regards the functioning of the machine. Following that analysis, the court also needed to ascertain that the understanding of a reasonable person would have been similar to the seller's in order for the seller's understanding to prevail.

On a broader level, with regard to scenarios where the understanding of a reasonable person is to be determined, the parties are likely to refer to any and all beneficial factors to their case to further solidify why a reasonable person would have had an understanding akin to their statements.

Interpretation of separate contractual clauses and contractual expectations should always be done by paying close attention to the contract itself in its entirety and to the purpose behind the conclusion of the contract.⁵³ In the author's opinion, this is of particular importance when resorting to Article 8(2) of the CISG and considering the

⁵² BG, 22.12.2000

⁵³ BGH, 3.4.1996; OLG Dresden, 27.12.1999; HG Zürich, 30.11.1998

understanding of a reasonable person. This is true for the simple reason that the standard of a reasonable person might otherwise lead to an interpretation that has drifted too far from the original purpose of the contract for the parties. The same conclusion is also supported by the fact that the CISG accepts the concept of *falsa demonstratio non nocet*,⁵⁴ whereby even faulty demonstrations of intent do not invalidate an agreement when both parties have made the same mistake. Accordingly, by bringing forth the ultimate purpose behind the contract, a contractual party in international trade inevitably enforces its position regarding any future disputes.

When drafting contractual clauses, parties should also acknowledge that arbitral tribunals and courts are likely to place a substantial amount of weight on the typical meaning given to the phrases used.⁵⁵ The commercial court of Zürich, for example, held that the concept of exchange (*austausch*) is understood to mean that when goods are to be replaced, the seller is expected to take back the original goods.⁵⁶ Naturally, the ordinary meaning of phrases do not outweigh party intent when that intent can be ascertained,⁵⁷ but parties should nonetheless be mindful of the general meaning that is given to the phrases used, especially when they clash with the intended meaning.

In a disputed situation where two parties are claiming to have understood a contractual obligation differently and neither party can establish that the other party factually was, or at least should have been, aware of their particular intent, the deciding authority, be it an arbitral tribunal or a court, must determine what a reasonable person would have understood in that situation based on all the information that was available. According to Professor Allan Farnsworth, in such a situation, a court or arbitral tribunal should primarily look for the most reasonable and sensible interpretation.⁵⁸ In this situation, as noted by Professors Fritz Enderlein and Dietrich Maskow, the end result could very well be an interpretation that goes against the intent of the party making the original statement.⁵⁹ That is, of course, only the case when the addressee's understanding was more reasonable, given the circumstances.

Given the above, parties operating in international trade should naturally aim to ensure that their particular intent regarding the conformity of the goods and any additional contractual expectations are sufficiently demonstrated to the counterparty. However,

⁵⁴ Farnsworth in Bianca/Bonell, p. 98, para. 2.3; Huber, p. 236; Lautenschlager, p. 260; Schmidt-Kessel in Schlechtriem/Schwenzer, p. 156, para. 23

⁵⁵ HG Zürich, 24.10.2003

⁵⁶ Ibid.

⁵⁷ US Federal Appellate Court, 29.6.1998 (MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino Spa)

⁵⁸ Farnsworth in Bianca/Bonell, p. 99, para. 2.4

⁵⁹ Enderlein/Maskow, p. 66

should the need to argue the reasonability of their interpretation arise, parties should effectively aim to establish that not only was their particular understanding made clear, but also that such an understanding was more reasonable than the one the opposing party is claiming.

1.1.3 Contra Proferentem

In connection with the CISG, international case law and scholarly writings contain certain rules that may be applied when a court or an arbitral tribunal is to determine the to-be-prevailing interpretation between two clashing ones. The principle of *contra proferentem*, which asserts that ambiguous contractual terms should be interpreted against the party that drafted the clause,⁶⁰ is arguably the most well known of those rules. The principle is applicable when assessing the understanding that a reasonable person would have had pursuant to Article 8(2) of the CISG in a situation where only one of the parties drafted the disputed contractual clause. In situations where the contractual wording is open to multiple reasonable interpretations, the party that is solely responsible for drafting the clause may then be held responsible for leaving the proverbial window open.⁶¹ Professor Honnold placed a great deal of weight upon the drafter of a term, specifically stating that in international trade where parties operate under different jurisdictions and frequently come from different language backgrounds, parties drafting contractual clauses should be especially mindful of any ambiguity that might be present in the interpretation of a contractual clause.⁶²

It is noteworthy that any ambiguity in the wording of a contractual clause may be eliminated by providing the counterparty additional information through, for example, oral conversations prior to the conclusion of the contract or otherwise taking action in a certain manner that is sufficient to address such ambiguities pursuant to Article 8(3) of the CISG.⁶³ As such, although a contractual clause may, at first glance, be seen as ambiguous and open to various understandings, the issue could have already been addressed by other means. The principle of *contra proferentem* can be easily seen as a solution to situations where the understanding of a reasonable person may not otherwise be ascertained and the parties were effectively under different understandings regarding the meaning of the clause. Awareness of this principle is of primary importance to parties operating in international trade, especially when a particular party frequently

⁶⁰ OLG Stuttgart 31.3.2008; CIETAC, 7.1.2000; Honnold, p. 118, para 107.1; Huber, p. 237

⁶¹ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 170, para 49

⁶² Honnold, p. 118, para. 107.1

⁶³ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 170, para. 49

incorporates into contracts terms that have been drafted by that party alone. Understandably, the principle is most frequently applied in cases where the ambiguous contractual clause is a standard clause that the drafting party attaches to all of its contracts.⁶⁴

It is important to remember that the principle does not establish an unavoidable rule that a court or an arbitral tribunal must decide against the party that drafted a clause.⁶⁵ For example, as stated in the Unidroit Principles Article 4.6, "if contract terms supplied by one party are unclear, an interpretation against that party is *preferred* [emphasis added]." ⁶⁶ The aim of the principle of *contra proferentem* is not to provide a compulsory rule for contract interpretation, but instead assist courts and arbitral tribunals in situations where a solution may otherwise not be found.

The author finds it of utmost importance that the scope of the principle remains limited. In the opposite situation, parties in international trade might be discouraged to draft terms, especially standard terms, the use of which has led to an increased effectiveness in international trade when the parties do not have to carefully converse and exchange thoughts as to each and every contractual clause. Increased application of the principle may also lead to situations where parties try to benefit from certain contractual clauses that are open to multiple interpretations, even when they are aware of the counterparty's understanding of that clause. Accordingly, the use of the principle should more so be seen as a tool of last resort and left to cases where a stronger and more influential contractual party imposes their standard terms onto a weaker party that justifiably understood the contractual obligation differently. In any case, parties operating in international trade that frequently incorporate standard clauses in their contracts would be wise to take this principle into consideration and avoid any ambiguity, if at all possible.

1.1.4 Contract Supplementation

By way of Article 8(3) of the CISG, an arbitral tribunal or court may also take into consideration the practices that have been established between the parties and relevant trade usages when determining both the actual intent of the parties as well as the understanding that a reasonable person would have had.⁶⁷ Regarding established practices, the parties may have used a certain contractual clause during previous

⁶⁴ Huber, p. 237

⁶⁵ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 170, para 49

⁶⁶ Unidroit Principles, Art. 4.6

⁶⁷ Art. 8(3) CISG

business dealings.⁶⁸ If the interpretation of that particular clause was established during that purchase, there is then no need to further specify the interpretation of the clause during the latest purchase unless said interpretation is to be changed. Naturally, it would be wise to ensure that a shared understanding may be proven in case of a dispute. Relevant trade usages may also be applied as a device for establishing party intent or the understanding of a reasonable person when such usages are recognized in the parties' places of operation.⁶⁹

In addition to being used as a device for establishing party intent and contractual expectations with regard to Article 8 of the CISG, established practices between the parties and trade usages may also be utilized as supplementary tools for determining conformity requirements and expected party conduct even in the absence of references to such practices or usages in the terms of the contract. This is established in Article 9 of the CISG.⁷⁰

A buyer may have justifiable expectations for the conformity of the goods on the basis of established practices and relevant usages, even without explicit stipulation of the applicability of such rules. Both parties may even be entitled to expect certain conduct from the counterparty based on previous business dealings and applicable usages. Parties may also believe that the contract contains certain rights that are accorded to both parties by way of established practices and usages. For example, in the case of *Hannaford v. Australian Farmlink*, the respondent argued that it was entitled to reduce the contractual price in accordance with the practice that had been established between the parties. The court, in that instance, admitted that established practices indeed enable the implementation of additional contractual rights. However, in that particular case, the respondent failed to establish the existence of the practice in question.⁷¹

With regard to the above, Article 9(1) of the CISG is clear in its wording. It provides that: "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."⁷² In order to simplify the issue, established practices and usages will be addressed separately in the following paragraphs. Moreover, the second paragraph of Article 9, which contains the notion of

⁶⁸ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 168, para. 46

⁶⁹ OLG Karlsruhe, 20.11.1992

⁷⁰ Art. 9 CISG; Federal Court of Australia, 24.10.2008 (*Hannaford v Australian Farmlink Pty Ltd*)

⁷¹ Federal Court of Australia, 24.10.2008 (*Hannaford v Australian Farmlink Pty Ltd*)

⁷² Art. 9(1) CISG

the application of international usages, will likewise be handled separately, although it may be also seen as creating rightful expectations to the parties.⁷³

1.1.4.1 Established Practices

When considering the existence of any established practices that may be relevant in assessing actual contractual obligations and justifiable expectations, the only factor of concern is previous business dealings between the involved parties.⁷⁴ Those dealings may have created certain expectations that one of the parties may rely on⁷⁵ even if the latest contract was silent on the issue. In fact, scholar Bout is of the opinion that a practice that has been sufficiently established automatically creates obligations for the parties unless the circumstances during the latest contract are significantly different or the parties have specifically agreed on the circumvention of the previously established expectations.⁷⁶ Practices, by their very nature, may only be relevant between the parties to which the practice has become custom.⁷⁷ In this context, they are distinctly different from usages that may apply to parties operating in a certain industry, possibly even globally.

In order for a practice to be considered ‘established’, a certain level on continuity is required.⁷⁸ The appellate court of Grenoble has, for instance, held that since an Italian seller continued to supply its buyer with the requested goods for *an extended period of time* without making an inquiry regarding the solvency of the buyer, its actions had created justifiable expectations on the buyer. By suddenly discontinuing the deliveries on these grounds, the seller was deemed to be in violation of the contract, thus enabling the buyer to pursue damages.⁷⁹

In reference to a ‘certain level of continuity’, the author relies on various court cases, wherein it was found that two contracts are not yet sufficient to create an established practice between the parties.⁸⁰

For a party to be entitled to rely on the concept of an established practice, the practice must have created actual and definite expectations on the reliant party.⁸¹ Parties wishing

⁷³ Art. 9(2) CISG

⁷⁴ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 186, para. 8

⁷⁵ LG Frankenthal, 17.4.1997; Schmidt-Kessel in Schlechtriem/Schwenzer, p. 186, para. 8; Schwenger/Leisinger, pp. 264-265

⁷⁶ Bout, Ch. II; see also, Pamboukis, pp. 113-114

⁷⁷ Bout, Ch. II; Graffi, p. 105

⁷⁸ OGH, 31.8.2005; CA Grenoble, 13.9.1995; HG Aargau, 26.9.1997; ZG Basel, 3.12.1997

⁷⁹ CA Grenoble, 13.9.1995

⁸⁰ HG Aargau, 26.9.1997; ZG Basel, 3.12.1997 (The court specifically stated that: “a previous relationship between two parties that is limited to two simultaneously-executed contracts does not fulfil this requirement.”)

to rely on an established practice must prove the existence of such a practice.⁸² There is no reason why a party cannot rely on an established practice in connection with a conformity requirement in accordance with Article 35 CISG.⁸³ Therefore, a buyer could potentially claim nonconformity of the delivered goods pursuant to Article 35(1) of the CISG because the seller violated an established practice and that it as a result delivered goods that were not of the quality required. The prerequisite quality may have been determined in a previous contract, and if the latest contract considered the same goods, the buyer could have justifiable expectations for the goods even if the latest contract did not contain a similar contractual clause or even if the quality of the goods had not been discussed. On the other hand, the seller may have, for instance, made it clear to the buyer that it wished for the goods to be resold to a certain location during the initial contract between the parties. In a situation where there would be multiple contracts between the parties, the seller could have justifiable expectations that the buyer would continue to adhere to this obligation even if it was not discussed further.

As for the concept of an established practice, the author simply wishes to make it clear that parties can define any and all contractual obligations and expectations during the initial contract between the parties. It stands to reason, and it is also economically viable, to support the supposition that these expectations do not require reiteration when parties decide to continue business dealings with each other. Unless further notice is provided and the contract considers the same goods, the parties should take into consideration the intent of the counterparty that was made clear during the past business dealings.

1.1.4.2 Agreed Upon Usages

The usage referred to in Article 9(1) of the CISG should be separated from the one contained in Article 9(2). Article 9(1) specifically refers to a usage that has been agreed upon between the parties.⁸⁴ The incorporation of a usage to a contract may be done expressly or impliedly.⁸⁵ Standards such as the *Tegernseer Gebräuche*⁸⁶ are frequently agreed upon between the parties, both impliedly and expressly, and along with such standards come certain justifiable expectations. By agreeing on these recognized

⁸¹ OGH, 31.8.2005 stating that “Practices are conduct that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance.”; Schmidt-Kessel in Schlechtriem/Schwenzer, p. 186, para. 8

⁸² HG Aargau, 26.9.1997; AmG Duisburg, 13.4.2000; Graffi, p. 110

⁸³ Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, p. 158, para. 10

⁸⁴ Art. 9(1) CISG

⁸⁵ OGH, 21.3.2000; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, p. 159, para. 13; Schmidt-Kessel in Schlechtriem/Schwenzer, p. 185, para 7; Schwenger/Leisinger, p. 265

⁸⁶ OGH, 21.3.2000

standards, the parties again save themselves the trouble of defining certain issues in detail in the contract document.⁸⁷ Through Article 9(1) of the CISG, parties may refer to any recognized usages or standards that do not have to fulfill the requirements set for international usages in Article 9(2).⁸⁸ Therefore, Article 9(1) enables the parties to simplify the process of contract negotiations in situations where a certain set of rules or standards sufficiently express their contractual expectations.

To a certain extent, the parties may be presumed to have agreed on the application of certain standards.⁸⁹ Such a presumption may be made, for example, in a situation where both contracting parties participate in the same private initiative such as the United Nations Global Compact.⁹⁰ Therefore, having the knowledge that the counterparty also takes part in the same private initiative, in a sense, enables a party to rely on the fact that both parties will adhere to the terms of that initiative when dealing with each other, even without it having been explicitly agreed upon.

With regard to the above, the author wishes to make the distinction between private initiatives and public initiatives such as the conventions of the International Labour Organization (ILO). Both parties coming from states that have ratified a certain international treaty does not by itself create an obligation on a private level that the parties may automatically rely on. Having said that, in a situation where a party wishes such rules to be applicable to a particular private contract, it is recommendable to make this intent known to the counterparty.

Seeing that because of Article 9(1) of the CISG, parties may effectively be seen as having impliedly agreed on the application of a certain set of rules or standards and so parties would be wise to recognize that certain behavior may be considered as a silent acceptance of the said rules.⁹¹ However, this is only the case when that party behaves in a manner that justifiably leads the counterparty to interpret this conduct as an acceptance. Such scenarios could, for instance, occur if the party operates particularly in accordance with a certain set of rules.⁹²

⁸⁷ Bainbridge, pp. 623-624; Bonell in Bianca/Bonell, p. 107, para. 2.1.2; Graffi, p. 106

⁸⁸ Bonell in Bianca/Bonell, p. 107, para. 2.1.2; Graffi, p. 106

⁸⁹ Ibid.

⁹⁰ Schwenger/Leisinger, p. 265

⁹¹ Bout, Ch. II; Pamboukis, p. 112

⁹² Ibid.

1.1.4.3 International Usages

International usages may become binding upon the parties even without the parties having agreed upon their application. To this effect, Article 9(2) of the CISG specifically states that:

*The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.*⁹³

The incorporation of international trade usages is regarded as an extension of the actual intent and justifiable expectations of the parties.⁹⁴ International trade usages apply in situations where it can be assumed that the parties are relying on them because they are widely recognized and observed, even if the parties did not explicitly discuss the application and relevance of those usages. As such, any party operating in the field of international trade may rely on such recognized standards, and if that standard is violated, the party may argue the breach of a contractual obligation so as long as the prerequisites regarding the applicability of the usage are met.

In line with the concept of party autonomy, parties have the power to exclude the application of a recognized international usage that would otherwise be applied to their contract.⁹⁵ The exclusion may be done either expressly or impliedly.

In fact, Professor Pilar Perales Viscasillas goes as far as saying that “usages of trade in [Article] 9(2) [of the CISG] are objective in character and thus ought to be considered as an objective and normative rule and source of law in international sale of goods contracts.”⁹⁶ In that instance, the implied intent would not even be questioned, but international usages would automatically apply unless explicitly excluded. In any event, in order for an international usage to be applicable, certain prerequisites must be met.

In order for a party to be entitled to rely on an international usage, the usage must be “widely known to, and regularly observed by, parties to contracts of the type involved.”

⁹⁷ It ought to be stated, however, that the concept of ‘international usage’ does not require global observance.⁹⁸ What is necessary is that most of the parties operating in

⁹³ Art. 9(2) CISG

⁹⁴ Schmidt-Kessel in Schlechtriem/Schwenzer, p. 188, para. 12

⁹⁵ Bonell in Bianca/Bonell, p. 108, para. 2.2.1; Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, p. 161, para. 19

⁹⁶ Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, p. 163, para. 24

⁹⁷ Art. 9(2) CISG

⁹⁸ OLG Graz, 9.11.1995; Ferrari, pp. 335-336

the relevant industry or area conforms to this usage and recognizes its applicability.⁹⁹ In fact, it is widely accepted in legal literature that even a usage of an entirely domestic nature can be applied as an international usage in accordance with Article 9(2) if the party from a different state has previously engaged in multiple similar contracts in that particular state.¹⁰⁰ Accordingly, it is recommended that parties inform themselves of such usages.

Article 9(2) also requires that the parties must either have known of the usage or at least have been in a position where they ought to have known of the relevant usage.¹⁰¹ International case law supports the supposition that implied knowledge of the parties is frequently applied, for instance, on the basis of residency in the area where such usage is recognized.¹⁰² Accordingly, widely known and regularly observed practices are of some importance to parties operating in international trade. Parties would be wise to stay up-to-date regarding usages to avoid unpleasant surprises, especially if the opinion endorsed by Professor Perales Viscasillas prevails, whereby any international usage that meets the prerequisites would automatically apply to a contract. Having knowledge of all the relevant usages enables the parties to decide which usages they wish to be applicable to their contract. Parties should also acknowledge that ignorance regarding an existing international trade usage does not protect them from the obligations imposed by that particular usage.¹⁰³

As it is with established practices, the party claiming the existence or applicability of a international usage bears the burden of proof regarding that issue.¹⁰⁴ Notorious usages, however, need not be established by the claiming party, but instead the court or arbitral tribunal may take such usages into consideration *ex officio*.¹⁰⁵ Accordingly, well known usages do not need to be explicitly referred to by the parties, but instead parties may automatically presume that the relevant authority will take that usage into consideration.

Regarding international usages Professors Fritz Enderlein and Dietrich Maskow make one very important statement in the author's opinion. The Professors emphasized that certain usages may well be acknowledged in industrialized states, but that developing

⁹⁹ OGH, 21.3.2000; OGH, 15.10.1998 (the Supreme Court specifically stated that: "an international usage is widely known and regularly observed if the majority of businessmen in a trade branch acknowledge it.")

¹⁰⁰ Bainbridge, p. 658; Bonell in Bianca/Bonell, p. 109, para. 2.2.3

¹⁰¹ Art. 9(2) CISG

¹⁰² OGH, 21.3.2000; OGH, 15.10.1998

¹⁰³ Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, p. 164, para. 25

¹⁰⁴ BG, 13.11.2003; AmG Duisburg, 13.4.2000; Graffi, p. 110; Huber in Huber/Mullis, p. 18

¹⁰⁵ Perales Viscasillas in Kröll/Mistelis/Perales Viscasillas, pp. 169-170, para. 33

countries might not yet be in a position where complete adherence is possible.¹⁰⁶ Such usages might, for example, relate to certain ethical requirements that parties operating in industrialized countries take for granted, but parties from developing countries cannot yet oblige. Enderlein and Maskow accordingly then consider that such standards may only be applicable as international usages between two parties from industrialized states.¹⁰⁷ This argument is consistent with the concerns raised by the delegates of socialist nations during the original drafting of the CISG. Those nations, in particular, were of the opinion that international trade usages are commonly established and created by industrialized states.¹⁰⁸ With regard to the opinions of Enderlein and Maskow, especially concerning widely accepted international usages, experienced parties may, at times, take the application of such usages for granted.¹⁰⁹ Accordingly, the author urges any parties contracting with parties from different backgrounds to consider the possibility that the usage might not bear the same weight or be acknowledged in the same manner in the state where the contracting party operates. Consequently, the global application of an international usage should be left to situations where it can be ascertained that the usage is, in fact, globally accepted and observed.

Awareness of any applicable international trade usages is of special importance to parties new to the field.¹¹⁰ As previously stated, ignorance of the relevant trade usages does not protect a business from any obligations imposed by that particular usage.¹¹¹ Accordingly, any entry into a new field of operation should be done with due care and parties making these transitions should take the time to inform themselves of any relevant usages.

1.2 Implementing Party Intent and Reasonable Expectations to Contractual Requirements in Connection with Article 35(1) of the CISG

Article 35(1) calls for the buyer to establish the requisite quality, quantity and description for the goods that the seller is to deliver.¹¹² Buyers are to make their expectations known regarding each of those three factors.¹¹³ In a situation where the

¹⁰⁶ Enderlein/Maskow, p. 70

¹⁰⁷ Ibid.

¹⁰⁸ Bout, Ch. II

¹⁰⁹ Honnold, p. 124, para. 112

¹¹⁰ Bout, Ch. II

¹¹¹ Supra, note 98

¹¹² Art. 35(1) CISG; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 489, para. 1; Schwenger in Schlechtriem/Schwenger, p. 571, para.

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¹¹³ Bianca in Bianca/Bonell, p. 272, para. 2.1

parties later find themselves in a dispute as to whether such expectations were sufficiently made known to the seller, the arbitral tribunal or court should take into consideration Articles 8 and 9 of the CISG in the manner explained in the previous portion of the text. In a situation where the characteristics of the delivery have not been adequately established, courts and arbitral tribunals should then refer to Article 35(2) of the CISG to determine what the parties were entitled to expect from the contract.

In the following paragraphs, the author will explain and comment on the current views regarding the interpretation of Article 35(1) of the CISG. Moreover, the text will also attempt to clarify a recommended course of action for both a buyer and a seller in international trade regarding Article 35(1).

1.2.1 Which Party Should Bear the Burden of Sufficiently Establishing the Requisite Quality, Quantity and Description?

Before delving into the concepts of quantity, quality and description, the text will first discuss the crucial issue of which party should primarily be held responsible for defining the expected delivery. In this regard, it is important to understand that the extent to which the buyer is obligated to establish the characteristics of the delivery vary based on the circumstances. It could then be sufficient that the buyer, for example, explains that the machine it intends to purchase, functions in a certain manner and the seller then would determine the specific technical attributes for the machine to be able to meet those expectations.¹¹⁴

According to Professor René Henschel, the obligation to deliver conforming goods falls first and foremost on the seller.¹¹⁵ In this context, the starting point would be to determine whether or not the seller has delivered goods that met the expectations of the buyer so as long as those expectations were sufficiently made known. Henschel justifies his reasoning on the basis that the seller ordinarily would know more regarding the goods to be delivered, whereas the buyer may not have even seen the goods yet.¹¹⁶ The buyer's obligation to take part in determining the requisite quality and description would then increase based on the buyer's knowledge of the goods to be delivered and the special requirements that the buyer expects of the goods and of the seller itself.¹¹⁷ As such, the buyer's expertise regarding the ordered goods is of primary importance.

¹¹⁴ AG Basel-Stadt, 26.9.2008

¹¹⁵ Henschel, Ch. 2

¹¹⁶ Ibid.

¹¹⁷ Ibid.

The author concurs with the view of Professor Henschel. It stands to reason that the buyer may, to a certain point, rely on the expertise of the seller when the buyer itself does not possess the necessary knowledge. The buyer would then take part in establishing elements that it has knowledge of, such as the quantity of the goods it wishes to have delivered and the purpose for which the goods will be used. In a situation where the buyer possesses more knowledge than the seller, the buyer should effectively be an active party in clarifying the quality of the goods to be delivered. In this regard, when the buyer, for example, operates in a specific ethically-minded market wherein it is important for the buyer to ensure that the seller adheres to certain ethical standards in the manufacture of the ordered goods, the buyer should accordingly inform the seller of any such expectations that impose obligations on the seller's conduct. Another example could be a situation where the buyer is constructing a machine that requires reinforced steel. The buyer would contract with a steel supplier for the delivery of steel suitable for the construction of that machine. However, the steel supplier may not be aware of the fact that ordinary steel will not do. In this case, if the seller was later to deliver regular steel and not reinforced steel, the seller should not be held responsible for delivering nonconforming goods if it was not properly informed since the buyer was the party that possessed more knowledge regarding the purchased goods and should consequently bear the consequences of not establishing the delivery in sufficient detail.

Taking the above into consideration, the obligations of the parties, in terms of defining the expected qualities of the goods are not difficult to assess. In situations where a buyer, for instance, purchases raw materials from multiple sources and the buyer itself is the party that combines the materials into a complete product, it would stand to reason for the buyer to then carry the ultimate responsibility in clarifying to the sellers its expectations with regard to the quality of the raw materials. On the other hand, in cases where the buyer is effectively not an expert as to what qualities the good is to have in order for it to be usable for the buyer's purpose and the seller can reasonably carry such a burden, the seller should then be the party that defines the requisite quality.

1.2.2 The Quantity of the Goods to be Delivered

Compared to the concept of quality, the correct quantity of the ordered delivery is usually easier to ascertain. The contract may contain an accurate specification of the amount of goods that is to be delivered or a certain window within which the delivery would be conforming to the terms of the contract. The contract might, for instance, refer to 50 000 trousers to be delivered, which, unless otherwise explained, does not leave

much room for interpretation for the seller. The contract might, for example, also state that the seller is to deliver 10 000-10 500 liters of juice. In such a situation, so as long as the quantum delivered falls within that frame, the seller would have delivered the requisite amount of juice. Any variation from the agreed upon quantum consequently leads to a nonconforming delivery on the seller's part.¹¹⁸ However, certain industries do accept minor deviations from the agreed upon quantum without it being regarded as a contractual violation.¹¹⁹

In this context, both the obligations of the buyer and the seller are fairly easy to ascertain. The buyer is urged to clarify in sufficient detail the quantity of the goods it expects the seller to deliver. By allowing the seller to deliver an amount within a certain frame, the buyer may not later claim nonconformity if the seller was to deliver as little or few of the agreed upon goods that the contract enables. Having made its expectations sufficiently known, the buyer may then rely on the seller to adhere to the requisite quantum.

Interestingly, the seller's delivery is also nonconforming in a situation where the seller delivers an excess amount of goods.¹²⁰ As such, any seller operating in international trade should take into consideration the possibility that any delivery of goods in excess to the contract may lead to a situation where the buyer is entitled to refuse to take the delivery.¹²¹

1.2.3 Ascertaining and Meeting the 'Correct' Quality

In terms of Article 35(1) of the CISG, quality is generally understood to refer to the tangible condition of the goods.¹²² Ordinarily, parties would establish that the goods should be manufactured out of certain materials, be of a certain size or color and so forth.¹²³ Failing to match those requirements would then relate to the seller having delivered nonconforming goods. As previously stated, in assessing whether or not the delivery, in the end, was nonconforming, regard should be made to the extent that the expected quality was established. To this effect, the buyer's position is ever stronger where the contractual expectations have been thoroughly explained.

¹¹⁸ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 494, para. 19; Schwenzer in Schlechtriem/Schwenzer, p. 572, para. 8

¹¹⁹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 494, para. 20; Schwenzer in Schlechtriem/Schwenzer, p. 572, para. 8 citing Hutter, p. 31, regarding an acceptable 5% deviance in the amount of cereal to be delivered according to German Uniform Conditions for trade in Cereal

¹²⁰ OLG Rostock, 25.9.2002; CA Paris, 22.4.1992

¹²¹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 495, para. 22

¹²² Kröll in Kröll/Mistelis/Perales Viscasillas, p. 495, para. 24

¹²³ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 495, para. 24; Schwenzer/Hachem/Kee, p. 377, para. 31.72

A case handled by the Appellate Court of Basel-Stadt may be referred to in order to clarify the statements made above. In that instance, the parties had agreed on a delivery of a packaging machine. Following the delivery of the machine, the buyer discovered that the machine was not able to meet the agreed upon packaging pace even though the buyer had made it expressly clear to the seller that the machine was, at the very least, to reach an output of 180 vials per minute. In that case, the buyer had no knowledge regarding the technology that was necessary to construct a machine able to meet this requirement, but the seller, on the other hand, had such knowledge. Accordingly, the court deemed that having made its expectations clear as to the functioning of the machine, the buyer was entitled to rely on the fact that the machine delivered could perform in the agreed manner. As a result, the court found that the delivered machine was not of the quality required.¹²⁴

In the above case, the seller was the party that had the knowledge regarding the technology necessary to meet the buyer's expectations. The buyer informed the seller sufficiently of its expectations and the seller, having concluded the contract, accepted the obligation to deliver a machine that met those expectations. In a case where a buyer would have had more knowledge regarding the actual technology of the machine, its role would arguably have been more extensive.

In another case, the Supreme Court of Austria found against the buyer, since it had not sufficiently addressed and clarified the quality of the pork liver it expected the seller to deliver. The parties, in that instance, had not agreed on any specific quality for the goods nor had the buyer informed the seller of any domestic regulations in Serbia regarding foreign meats. The delivered goods met the relevant EU-regulations and were, without a doubt, suitable for human consumption. Upon import to Serbia, the customs officials there nevertheless found the goods to be defective and denied entry of the meats. As a result, the buyer sued the seller on the basis of the seller having delivered nonconforming goods. The court found that the goods delivered had been of the quality the buyer was entitled to expect. Much like in the ruling of the *New Zealand Mussels case*,¹²⁵ the court held the buyer responsible for informing the seller of any unique regulations that prevail in the destination state that are different than in the seller's place of operation. Accordingly, in order for the seller to take those regulations into

¹²⁴ AG Basel-Stadt, 26.9.2008

¹²⁵ BGH, 8.3.1995

consideration, the buyer, as the party more knowledgeable of those rules, should inform the seller of their application.¹²⁶

The two cases referred to above demonstrate how the buyer's role in establishing the anticipated quality varies based on the actual and expected knowledge of the party. It is important to note that that general practice and contracts themselves, as with the quantity to be delivered, usually allow for minor deviations from the agreed upon quality.¹²⁷

1.2.4 The Broad Concept of Quality

Although the usual understanding with regard to the term quality refers to the tangible attributes and performance of the delivered goods, the prevailing view in legal literature, as expressed by authors such as Professor Ingeborg Schwenzer and Professor Alastair Mullis, effectively establishes that the word quality in connection with the CISG encompasses not just the tangible quality of the goods, but also refers to beyond that to the manufacturer's conduct in the production of the goods.¹²⁸ Consumer preferences have effectively led to situation where the manufacturer's conduct may be of importance to the initial buyer and, moreover, to a possible target audience for the goods. It may, for instance, be crucial to the buyer that the manufacturer produces the goods in an ethical manner in order for the buyer to be able to resell the goods further to consumers that are likewise motivated by such ethical standards.¹²⁹ In accordance with the prevailing view in legal literature, such expectations may effectively impose requirements that the manufacturer must adhere to in order to deliver conforming goods. To this effect, the concept of party autonomy in relation to Article 35(1) of the CISG is not limited, but the parties may agree on virtually anything regarding the nature of the goods and how those particular goods should be manufactured.¹³⁰

As far as the buyer is concerned, its duty is to establish both the tangible nature of the goods it expects to receive and also any sort conduct it expects from the seller which might affect the usability of the goods for the buyer's purposes. Such expectations should be made known in a sufficiently clear manner in order to eliminate the possibility of the seller arguing that it was not informed of such expectations, which then may not be used to determine the quality of the goods the buyer was entitled to

¹²⁶ OGH, 25.1.2006

¹²⁷ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 493, para. 17

¹²⁸ Mullis in Huber/Mullis, p. 132; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 495, para. 25; Maley, p. 104; Schwenzer/Hachem/Kee, p. 377, para. 31.70; Schwenzer in Schlechtriem/Schwenzer, pp. 572-573, para. 9

¹²⁹ Schwenzer/Hachem/Kee, p. 377, para. 31.70

¹³⁰ Henschel 2005, p. 162

expect. The buyer could then effectively require that the goods it wishes to purchase should be, for instance, manufactured free from the use of child labor or manufactured in a manner that promotes sustainable development.¹³¹ If it was then later discovered that the seller did not adhere to these terms, the buyer could claim nonconformity of the delivered goods pursuant to Article 35(1) of the CISG, irrespective of whether or not the goods themselves were free of any tangible defects.

Although a buyer may have various reasons for it to require goods to be manufactured in a certain manner, it is important to recognize that the way in which goods are manufactured also frequently affects the final value of the delivered goods.¹³² Such a sentiment is evident, for example, in the *Organic barley case* tried in the Appellate Court of Munich.¹³³ In that particular instance, the buyer and the seller agreed on the delivery of organically manufactured barley. Even though organically manufactured barley cannot be distinguished from 'normal' barley post-production, it is sold at a different market compared to 'normal' barley. This is partly due to the fact that the production costs for organically manufactured barley are higher compared to regular barley. As a result, the final price of the organic barley is accordingly higher than regular barley. Due to a lack of necessary documentation, the delivered barley could not be sold in a European market as organic. Without such documents, the barley could only be sold at the price of regular barley, which consequently related to the seller having delivered barley that was not of the agreed upon value. Therefore, the court found that the seller delivered nonconforming goods pursuant to Article 35(1) of the CISG. In the end, the buyer, however, lost its right to rely on that nonconformity because it had delayed addressing it for too long pursuant to Article 39(1) of the CISG.¹³⁴

Similarly, ethically manufactured goods are likewise sold at a different market than goods that do not carry the same label. Certain consumers are effectively willing to pay more for the guarantee that the purchased good has been produced in a socially responsible manner.¹³⁵ As a result, goods that have indeed been manufactured in an ethical manner are of a higher value than goods that do not come with that guarantee. In this context, it then stands to reason that if the contract called for the seller to produce the goods in an ethical manner and the seller did not abide by this agreement, it would consequently deliver nonconforming goods, even if the goods themselves carried no

¹³¹ Henschel 2005, p. 162

¹³² Schwenger/Leisinger, p. 266

¹³³ OLG München, 13.11.2002

¹³⁴ Ibid.

¹³⁵ Schwenger/Leisinger, p. 266

physical defects. If this deviation later becomes apparent to the buyer, it could then claim nonconformity of the delivered goods pursuant to Article 35(1) of the CISG.

Naturally, the financial value of the goods may not be the only reason for imposing behavioral requirements on the seller. The buyer could also, for example, be motivated by religious standards, which might, in turn, lead to a need to have the goods manufactured in a certain manner.¹³⁶ For instance, if a buyer ordered *halal* goods from a seller but received *non-halal* goods, the seller delivered goods not of the quality required, regardless of whether or not the goods were of the same financial value.

As regards any intangible discrepancies, case law has also shown that the origin of the goods may also be a factor in determining whether or not the seller delivered goods in conformity with the contract.¹³⁷ For example, in a case tried in the German Supreme Court where the contract concerned the delivery of cobalt sulphate, the parties agreed that the cobalt sulphate should be of British origin. It was later discovered that the delivered cobalt sulphate was made in South Africa, following which the buyer claimed nonconformity of the delivered goods pursuant to Article 35(1) of the CISG. The Supreme Court concurred with the opinion of the buyer that the seller had failed to adhere to a contractual obligation, and that, as a result, it had violated the terms of the contract.¹³⁸

Similarly, the Appellate Court of Zweibrücken deemed in a case that a seller had not delivered conforming goods when, against the original agreement of the delivery of goods of a German origin, it later provided the buyer with goods manufactured in Russia and Turkey.¹³⁹

The author acknowledges that the origin of goods may be of importance to the buyer for various reasons. Goods produced in a certain state may be inherently of higher value than goods manufactured in another state. The buyer may also be motivated by other concerns, such as the way goods are manufactured in different states. On the other hand, the seller may also be interested in the final destination state for the goods. Such a sentiment can be seen in a case previously referred to, which was tried in the Appellate Court of Grenoble. In that instance, the seller had frequently informed the buyer of the fact that it required and expected the goods to be sold in Africa or South America. The

¹³⁶ Schwenger, p. 105

¹³⁷ BGH, 3.4.1996; OLG Zweibrücken, 2.2.2004; Mullis in Huber/Mullis, p. 132

¹³⁸ BGH, 3.4.1996

¹³⁹ OLG Zweibrücken, 2.2.2004

buyer failed to adhere to this expectation but instead decided to sell the goods in Spain. As a result, the court found that the buyer had violated an express term of the contract.¹⁴⁰

A good example of a situation where the origin or final destination state for the goods may be of importance to the parties is the so-called 'blood diamonds' (also known as 'conflict diamonds'). Blood diamonds are utilized to fund armed conflicts and civil wars in Africa.¹⁴¹ Participants in the Kimberley Process Certification Scheme¹⁴² aim to ensure that diamonds are not used in funding such efforts. Accordingly, parties that participate in that scheme would not accept diamonds of certain origin or accept the delivery of diamonds to those countries wherein mistreatment might occur.

In case of a violation of a behavioral requirement, the remedies available to the buyer are a different matter altogether. In this regard, the financial value of the delivered goods and the actual usability of the goods to the buyer are of primary importance. To this effect, Professor Stefan Kröll has stated that even if the arbitral tribunal or court were to find the seller as having delivered nonconforming goods but the delivered goods were of the same value as conforming goods would have been, the remedies available for the buyer will likely be limited.¹⁴³ In such situations, the buyer cannot pursue damages and unless the nonconformity is seen as a fundamental breach of the contract, the buyer is not entitled to avoid the contract as a result.¹⁴⁴ Moreover, in assessing whether or not the nonconformity amounts to a fundamental breach, the court or arbitral tribunal is likely to assess whether or not the buyer can still make reasonable use of the goods. In this regard, the Supreme Court of Switzerland, for example, took into consideration the fact that the buyer could still resell the defective goods, even if only at a discount and consequently held that the nonconformity did not amount to a fundamental breach of the contract. However, the buyer was awarded damages for the difference in value between the delivered goods and the ones initially agreed upon.¹⁴⁵

The above is also true as regards situations where the goods were procured from a state other than had been contractually agreed or delivered to a location that was different from otherwise expected. In the *Cobalt Sulphate case*, although the court did find a

¹⁴⁰ CA Grenoble, 22.2.1995

¹⁴¹ www.amnestyusa.org/our-work/issues/business-and-human-rights/oil-gas-and-mining-industries/conflict-diamonds

¹⁴² www.kimberleyprocess.com/

¹⁴³ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 494, para. 18

¹⁴⁴ Ibid.

¹⁴⁵ BG, 28.10.1998

violation of a contractual obligation pursuant to Article 35(1) in that the seller had delivered goods of the wrong origin, the court denied the existence of a fundamental breach and consequently held that the buyer's avoidance of the contract was unjustified.¹⁴⁶ In the case handled by the Appellate Court of Zweibrücken where the goods were also of an incorrect origin, the court found the buyer to be entitled to receive damages, but only to the amount sufficient to rectify the difference in value between the goods agreed upon and the ones actually delivered.¹⁴⁷

Regarding any behavioral requirements, if the parties have agreed in the terms of the contract on liquidated damages that the breaching party must bear in case of a violation, the issue is naturally much easier to consider as that remedy could be pursued, regardless of the reason for ignoring that requirement. The above, of course, excludes reasons that justify contractual deviations in accordance with Article 79 of the CISG.¹⁴⁸

1.2.5 The Relevance of the Value and Utility of the Goods to the Buyer in Assessing the Presence of a Contractual Violation

With regard to the previous sentiments, Professor Schwenger has, in fact, stated that the actual usability and value of the goods are irrelevant when ascertaining whether or not the seller has breached the contract by delivering goods of a defective quality.¹⁴⁹ In her opinion, a contractual violation is presumed whenever the goods do not match the expected quality and the value and usability of the goods are only relevant in assessing whether or not the nonconformity amounts to a fundamental breach.¹⁵⁰ Although the concept of party autonomy enables parties to agree on virtually anything regarding the characteristics of the goods and how they are to be produced,¹⁵¹ the author finds it difficult to support such an extreme sentiment.

The previously mentioned ruling from the commercial court of Zürich, in fact, established that when the seller has delivered goods that are effectively of the same value and utility as they would have been had the seller adhered to the obligations of the contract, the seller has not *automatically* breached the contract, even if the delivered goods were nonconforming.¹⁵² Although this view should not be taken too far, minor deviances that do not affect the value or usability of the goods for the buyer's purposes

¹⁴⁶ BGH, 3.4.1996

¹⁴⁷ OLG Zweibrücken, 2.2.2004

¹⁴⁸ Art. 79 CISG

¹⁴⁹ Schwenger in Schlechtriem/Schwenger, p. 573, para. 9; in agreement: Maley, pp. 104-105;

¹⁵⁰ Ibid.

¹⁵¹ Henschel 2005, p. 162

¹⁵² HG Zürich, 30.11.1998

should not, in the author's opinion, automatically be seen as a contractual violation. The opposite conclusion would enable parties to pursue contractual repercussions even in situations where the buyer did not suffer in any way due to the discrepancy. Such view is in direct confrontation with the concept of reasonability, the application of which can be witnessed across the board when examining CISG related case law and the text of the CISG itself.

In the author's view, the assessment of whether or not a minor defect in the physical quality of the goods relates to a contractual violation should be made on a case-by-case basis. To this effect, when the parties have, for instance, agreed on a certain color of trousers, if the seller delivers trousers of a different color, the seller has clearly violated the terms of the contract, irrespective of whether the buyer can still make use of the goods. On the other hand, in cases where the defect is not clearly visible and in no way affects the durability, usability or value of the delivered goods, such as a different manner in which a shirt was sewn, should not automatically be seen as a contractual violation. Scholar Schwenger's supposition that a contractual violation is automatically presumed in cases of defective quality might lead to even more unreasonable situations in cases of intangible defects. In the author's opinion, it would not be reasonable to pursue contractual remedies in situations where the goods themselves were of flawless quality and perfectly usable for the buyer, but the seller merely deviated from the agreement in a minor way during the manufacturing phase. After all, the purpose of these international transactions is to obtain the goods, not to control and manage the entire business operation of the counterparty.

In light of above argumentation, a situation can be considered where the buyer is from Germany and the seller from Sweden. The parties initially agree on the fact that the goods are to be manufactured in Sweden. However, during the manufacturing phase, the seller's facilities are affected by a strike. In order to ensure timely delivery, the seller instead utilizes a factory located in Finland, where the goods are manufactured out of the same materials. Finally, the seller delivers goods to the buyer that are of exactly the same tangible quality, value and usability as goods manufactured in Sweden would have been. Should this be deemed as a contractual violation seeing as the goods were not, in fact, manufactured in Sweden? Accordingly, the value and utility of the goods delivered by the seller may indeed, in the author's opinion, be of some importance when

ascertaining whether or not the seller has breached the contract by delivering nonconforming goods.

The author hopes to clarify that the financial value and the usability of the goods is by no means a starting point in establishing whether or not the delivered goods were of the requisite quality to the buyer. As per above, the principle of party autonomy effectively enables the parties to agree on how the parties are to behave.¹⁵³ The purpose regarding the above argumentation is simply to point out that, in the author's opinion, when assessing whether the seller has truly breached a contract by way of delivering nonconforming goods, the value and usability of the goods to the buyer should not be seen as entirely irrelevant.

1.2.6 Goods of the Correct Description

Article 35(1) of the CISG also calls for the seller to deliver goods of the description as determined by the parties.¹⁵⁴ This concept has, in a way, been left on the wayside in the recent commentaries for the CISG, while the term quality has been referred to in a broader way. Professor Cesare Bianca has stated that “the description is the usual way through which the parties determine the content of their obligations.”¹⁵⁵ According to Professor Bianca, whether or not the goods delivered match the agreed description should be determined on the basis of individual party representations before the conclusion of the contract.¹⁵⁶ To be clearer, the seller's representations of the goods, for example, advertisements that refer to the quality of the goods, should be taken into consideration. Moreover, the correct description may also be determined through the buyer's requests regarding the goods that the seller has not objected to.¹⁵⁷ It would appear that the requirements concerning the correct quality and description seem to be somewhat overlapping, which would explain the reason why recent scholarly opinions have not focused much on the concept of a contractual description.

1.2.7 Burden of Proof Regarding Nonconformity Pursuant to Article 35(1)

In connection with the CISG, it is generally understood that a party making claims pursuant to articles of the CISG bears the burden in establishing the reasoning why the claim should be supported and accepted.¹⁵⁸ A case handled by the district court of

¹⁵³ Henschel 2005, p. 162

¹⁵⁴ Art. 35(1) CISG

¹⁵⁵ Bianca in Bianca/Bonell, p. 273, para. 2.3

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Linne, pp. 32-33; Neumann, para. 36

Vigevano supports the above argument. In that particular case, the court specifically emphasized that a party making assertions must also justify why its claims should be recognized as correct.¹⁵⁹ If this view is seen as unilaterally correct, the burden of proof in establishing that the goods delivered by the seller were nonconforming would then fall on the buyer as it is the party that would ultimately benefit from such a decision.¹⁶⁰

Upon inspection of the relevant case law, it is clear that the issue of burden of proof is not quite as simple as depicted above. In terms of which party bears the burden of proof on whether or not the goods, in the end, were in conformity with the contract, courts and arbitral tribunals have made decisions on both sides. At times, the seller has been obligated to prove that the goods it delivered matched the contractual definitions.¹⁶¹ At other times, this burden has been borne by the buyer.¹⁶² Contrary to the above however, according to the prevailing view, in practice, the burden of proof falls initially on the seller, but shifts to the buyer at the time of delivery.¹⁶³ The prevailing view appears to be the most reasonable as the party in possession of the goods is arguably in the best position to establish whether or not the goods are in conformity with the contract.

Consideration of the practice is important for parties that intend to make assertions pursuant to Article 35 of the CISG. Accordingly, parties would be wise to keep records throughout the progress of the transaction and, if the time comes, be ready to present evidence and argumentation as to how the contract was violated.

¹⁵⁹ DC Vigevano, 12.7.2000

¹⁶⁰ Neumann, para. 38

¹⁶¹ CC Kortrijk, 6.10.1997; LG Berlin, 15.9.1994

¹⁶² BG, 13.1.2004; US Federal Appellate Court [7th Circuit], 23.5.2005

¹⁶³ AH Bern, 11.2.2004; HG Zürich, 30.11.1998; Henschel, Ch. 5

Chapter 2

The Supplementary Definition of Conformity Pursuant to Article 35(2) of the CISG

The purpose of the second paragraph of Article 35 of the CISG is to establish certain basic expectations regarding the goods to be delivered unless otherwise agreed by the parties.¹⁶⁴ Article 35(2) also serves to assist in situations where the contractual expectations in relation to the conformity of the goods have only been insufficiently addressed.¹⁶⁵ Insofar as there are express or implied terms that adequately illustrate the expected characteristics of the ordered goods, reliance on Article 35(2) is not necessary.¹⁶⁶ Article 35(2) contains four different definitions as to the conformity of the goods. According to Article 35(2):

*Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.*¹⁶⁷

In order to clarify the above article, Professor Stefan Kröll's words are of much help. He states that "[Article] 35(2) protects the reasonable expectations of the parties where the contractual provisions concerning conformity of the goods are insufficient."¹⁶⁸

Within the requirements of Article 35(2), there exists a certain hierarchy. Whenever the buyer has informed the seller of a particular purpose, for the goods to be purchased, that purpose takes precedence over any assumed ordinary purposes.¹⁶⁹ As a result, ordinary purposes for the goods are relevant only in situations where a particular purpose has not been established.¹⁷⁰ To simplify this sentiment, an example can be given. Ordinarily parties could assume that a television purchased would function like any other television, that is be capable of broadcasting television programs. However, in a

¹⁶⁴ Bianca in Bianca/Bonell, p. 272, para. 2.1; Hyland, p. 312; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 489, para. 2

¹⁶⁵ Honnold, p. 256, para. 225; Schwenger in Schlechtriem/Schwenger, p. 575, para. 12

¹⁶⁶ Bianca in Bianca/Bonell, p. 272, para. 2.1

¹⁶⁷ Art. 35(2) CISG

¹⁶⁸ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 489, para. 3

¹⁶⁹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 505, para. 61; Schwenger in Schlechtriem/Schwenger, p. 575, para. 12

¹⁷⁰ Ibid.

situation where the buyer has clarified that the television will not be used for viewing purposes but that instead it will simply be used as a decorative object, the television need not then fulfill the requirements an ordinary purpose would impose on it. In cases where it is not clear whether or not the existence of a particular purpose excludes the relevance of ordinary purpose, both should be applied in unison.¹⁷¹

Article 35(2) takes into account the known factor that parties might, due to various reasons, overlook to express and clarify certain expectations for the goods. In those scenarios, Article 35(2) can be seen as a legal backup which ensures that sellers must adhere to common and reasonable expectations.¹⁷² Admittedly, any requirements that Article 35(2) might impose can be excluded by the use of express contractual terms.¹⁷³ Accordingly, parties ought to be aware of the ordinary purposes for the goods if they intend to exclude their relevance either by expressing an intended particular purpose or by agreeing on express clauses.

In the following chapter, the first two elements of Article 35(2) will be particularly discussed. Less weight will be placed on the last two requirements, as they have appeared to be less problematic in case law and scholarly opinions.

2.1 The Ordinary Purpose for the Goods in Imposing Obligations to the Seller Pursuant to Article 35(2)(a) of the CISG

Article 35(2)(a) of the CISG essentially operates by creating the minimum requirements that goods must meet in order for them to be conforming with the contract.¹⁷⁴ According to Article 35(2)(a), “[Goods must be] fit for the purposes for which goods of the same description would ordinarily be used.”¹⁷⁵ Goods must be suitable for those ordinary purposes unless the parties have expressly agreed otherwise¹⁷⁶ or an existing particular purpose eliminates the need for adherence with ordinary purposes.¹⁷⁷ Goods are to, at the very minimum, be of the quality and utility goods of the same nature would ordinarily be.¹⁷⁸

¹⁷¹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 505, para. 61

¹⁷² Honnold, p. 255, para. 225; Kröll in Kröll/Mistelis/Perales Viscasillas, pp. 505-506, para. 63

¹⁷³ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 506, para. 64; Lookofsky, pp. 90-91; para. 164

¹⁷⁴ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 506, para. 66

¹⁷⁵ Art. 35(2)(a) CISG

¹⁷⁶ Schwenzer in Schlechtriem/Schwenzer, p. 575, para. 13

¹⁷⁷ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 505, para. 61; Schwenzer in Schlechtriem/Schwenzer, p. 575, para. 12;

¹⁷⁸ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 506, para. 67

To this effect, ‘fitness for ordinary purposes’ is generally understood to mean, at the very least, the marketability of the goods.¹⁷⁹ A buyer should usually be entitled to expect that the resale of the purchased goods is possible. Accordingly, buyers need not usually express such an expectation, but instead reliance on it is justifiable on the basis of Article 35(2)(a).

The above sentiment is also echoed in multiple court cases.¹⁸⁰ In a case handled by the Supreme Court of Germany, the dispute concerned the delivery of Belgian meats. The delivered meat contained an unacceptable quantum of dioxin, which subsequently led to the confiscation of the goods by Serbian customs officials. As a result, the buyer was deprived of the benefits, as they were unable to resell the goods against original intentions. In its decision, the court emphasized that the basic expectation in international trade regarding goods is that they are resalable. As for edible products, an ordinary purpose would also be their fitness for human consumption. By delivering goods that were neither resalable nor fit for humans to consume, the seller delivered nonconforming goods pursuant to Article 35(2)(a).¹⁸¹

Naturally, the buyer’s purpose might not be to resell the purchased object, but to instead use it for the purposes such an object would ordinarily be used. Goods could then be expected to be suitable for the buyer’s use in its facilities as machinery or perhaps as raw material.¹⁸² In this context, such expectations are also to be protected. In cases where the goods could ordinarily be expected to be suitable for multiple different purposes, the goods should, as a general rule, be suitable for all of those purposes unless otherwise agreed.¹⁸³

The idea that the seller should be held responsible, to a certain extent, for delivering goods that are fit for any normal use is built around the understanding that it is generally easier for the seller to avoid the defects. Moreover, the seller is generally in a better position to procure the necessary insurances.¹⁸⁴

The concept of fitness for ordinary purposes is effectively built on the idea of reasonability in international trade. Accordingly, courts have found the seller’s delivery to have been nonconforming in various cases wherein it is clear that the seller truly delivered defective goods. For instance, in a case tried in the Supreme Court of France,

¹⁷⁹ Lookofsky, p. 91; Schwenger in Schlechtriem/Schwenger, p. 575, para. 14

¹⁸⁰ BGH, 2.3.2005; High Court of Auckland, 31.3.2003

¹⁸¹ BGH, 2.3.2005

¹⁸² Kröll in Kröll/Mistelis/Perales Viscasillas, p. 507, para. 69

¹⁸³ Ibid.

¹⁸⁴ Gillette/Ferrari, p. 8

the buyer intended to purchase ceramic ovenware. The inherent purpose of the goods was usability of the goods in high temperatures. Nevertheless, upon delivery of the goods the buyer discovered that the delivered goods were not heat resistant. Taking into consideration the ordinary purpose of the goods, the Supreme Court concurred with the buyer and stated that the seller delivered defective goods, in that the ovenware was not fit for use for the purposes similar goods would ordinarily be used.¹⁸⁵ In another case, the a seller had delivered ashtrays to the buyer, but following the delivery of the goods, the buyer found that the delivered goods were, in fact, dangerous, because they contained overly sharp edges. In accordance with Article 35(2)(a), the Supreme Court of Switzerland held that a buyer of ashtrays is ordinarily entitled to expect goods that are not dangerous to the consumers.¹⁸⁶

Ordinary purpose also contains the notion that goods must be fit for that purpose for a certain period of time.¹⁸⁷ To this effect, perishable goods such as fruits and meat should then be fit for human consumption for a certain period of time following the delivery of the goods.¹⁸⁸ Moreover, the same concept of a necessary duration of usability also extends beyond perishable goods.¹⁸⁹ In this regard, in a case tried in the District Court of Munich where the buyer had purchased globes for display purposes, the court found that the buyer was entitled to expect a certain lifetime for the purchased goods. Taking into consideration the price, according to the Court, it was reasonable and normal to expect a lifetime of three years. Having delivered globes that fell far short of this expected lifespan, the seller delivered goods which were not in conformity with the contract.¹⁹⁰

Fitness for ordinary purpose may even require the delivery of proper instructions for the construction and usage of the goods, insofar as this can be seen as an ordinary and reasonable expectation.¹⁹¹ Such a sentiment was supported by, for instance, the Supreme Court of Germany.¹⁹² The case concerned the delivery of printing hardware as well as software. Following the delivery, the buyer claimed nonconformity of the delivery since the seller had not provided the buyer with appropriate documentation necessary for the use of the printing hardware. Accordingly, the Court found the seller's delivery to have

¹⁸⁵ CdC, 17.12.1996

¹⁸⁶ BG, 10.10.2005

¹⁸⁷ Enderlein/Maskow, p. 145; Lookofsky, p. 92; Schwenger in Schlechtriem/Schwenger, p. 576, para. 14

¹⁸⁸ Schwenger in Schlechtriem/Schwenger, p. 576, para. 14

¹⁸⁹ Ibid.

¹⁹⁰ LG München, 27.2.2002

¹⁹¹ Schwenger in Schlechtriem/Schwenger, p. 576, para. 14

¹⁹² BGH, 4.12.1996

been nonconforming, although the buyer's claims for a substantial breach and justifiable avoidance could not be supported.¹⁹³

All of the previous scenarios are ultimately based on the reasonability of the expectations of the buyer - expectations that any buyer operating in international trade could have justifiably relied on even in situations where those expectations were not stipulated in the contract document or otherwise addressed during the negotiations leading to the conclusion of the contract. Accordingly, buyers can automatically assume certain aspects of the impending delivery of the agreed upon goods even without specific contractual stipulations. Sellers, on the other hand, must take those ordinary expectations into consideration when completing the delivery, unless the parties have otherwise agreed.

Furthermore, when assessing any obligations that Article 35(2)(a) imposes, consideration is to be made regarding certain specific factors. These include the price of the goods to be purchased and the expertise of both parties.¹⁹⁴ A higher price of the goods naturally leads to more extensive expectations for the condition, durability and usability of the goods.¹⁹⁵ The reputation of the seller could also be seen as a relevant factor, as a buyer purchasing from a renowned seller could justifiably have higher expectations for the characteristics of the ordered goods.¹⁹⁶

With regard to all of the above, a question then arises: where is the limit that no longer falls within the expectations for ordinary usage? In this regard, multiple cases have, for example, established that the concept of fitness for ordinary purposes by no means requires the goods to be of perfect quality.¹⁹⁷ The goods must simply be fit for the usage that similar goods would normally be used. A Belgian Commercial Court, for example, acknowledged that while some damage had been caused to the delivered goods, that damage did not alter or affect the goods in a way that resulted in the goods being unfit for their ordinary purpose.¹⁹⁸ Similarly, an ICC arbitral tribunal found that although a part of the goods delivered could not be used in the state they were delivered in, the goods could "easily be re-transformed" to a condition where they would be fit for their ordinary purposes. As a result, the tribunal did not find a violation pursuant to Article

¹⁹³ BGH, 4.12.1996

¹⁹⁴ Enderlein/Maskow, p. 144; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 510, paras. 80-81

¹⁹⁵ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 510, paras. 80-81

¹⁹⁶ Ibid.

¹⁹⁷ CC Hasselt, 28.6.2006; ICC Case No. 8247, 6.1996; See also: Enderlein/Maskow, p.144; Lookofsky, p. 91

¹⁹⁸ CC Hasselt, 28.6.2006

35(2)(a) of the CISG.¹⁹⁹ To this effect, Professor Stefan Kröll asserts that insofar as the seller has delivered goods of ‘a reasonable quality’, it has then obliged with the requirement imposed by Article 35(2)(a) of the CISG.²⁰⁰

International case law has also frequently witnessed an issue concerning conditions or regulations prevalent in the destination state of which the seller, operating in a different nation, was not aware of. To what extent should the seller be held responsible for ascertaining the conditions that exist in the destination state for the goods when the buyer provides no such information? To this effect, scholarly opinions and court cases have had to decide under which country's standards - the buyer's or the seller's - should the ordinary utility of the goods be assessed. The existing conditions and standards could be different in the parties' states of operation for various reasons such as climate, cultural background and so forth. *The New Zealand Mussels case*²⁰¹ is, with regard to this issue, the leading and most frequently cited case. As mentioned in the previous chapter, the German Supreme Court held that as a general rule, the seller should not be held responsible for ascertaining the unique standards and regulations that exist in the destination state for the goods that are different than in the seller's place of operation.²⁰² Moreover, *the New Zealand Mussels case* founded a three-point-analysis within which a seller should be aware of even the unique standards of the destination state. A seller is to inform itself of those standards when the seller's state acknowledges the same standards, the buyer has specifically informed the seller of those standards, or when due to ‘special circumstances’, the seller should for one reason or another be aware of those standards. In this light, ‘special circumstances’ could, for example, be the seller having frequently exported goods to the destination state.²⁰³ Professor Stefan Kröll agrees with the view of the German Supreme Court, in that it is unreasonable to expect that sellers are beforehand aware of all the different public law regulations and standards that are abided by in the destination state.²⁰⁴ To then assume that a seller should, in any case, be held responsible for delivering goods that are in accordance with all unique regulations and standards would lead to a requirement for the seller to always inform itself of all such standards.²⁰⁵ It is worth noting, however, that in Professor Kröll's opinion, the standard of 'special circumstances' established by the German Supreme Court is

¹⁹⁹ ICC Case No. 8247, 6.1996

²⁰⁰ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 509, para. 79

²⁰¹ BGH, 8.3.1995

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 512, para. 89

²⁰⁵ Ibid.

frequently applicable, by use of which the seller would then be responsible for ascertaining even the unique standards that exist in the destination state for the goods.²⁰⁶

In order to ensure that the seller takes any unique conditions and standards into consideration, it is recommendable that the buyer, at the very least, informs the seller of those factors. The notification should be sufficiently clear in order to avoid any misunderstandings. In terms of a sufficient notification, a Dutch Appellate Court, for example, stated that the buyer, having informed the seller of German authorities applying 'strict regulations', was not adequately specific.²⁰⁷

In contradiction to the above court cases, multiple scholarly opinions appear to support an argument that, by simply informing the seller of the destination where the goods will in actuality be used, the buyer has informed the seller of a particular purpose for the goods pursuant to Article 35(2)(b).²⁰⁸ Professor Peter Schlechtriem, for example, contended that whenever the seller has been informed of the state in which the goods will ultimately be used, that notification qualifies as a particular purpose pursuant to Article 35(2)(b).²⁰⁹ Consequently, Professor Schlechtriem asserted that in those situations, the seller should usually inform itself of the conditions that prevail in that destination state and be held responsible if it did not do so.²¹⁰ In agreement with Professor Schlechtriem is also Professor Ingeborg Schwenzer, according to whom, it is only in rare cases that reference to Article 35(2)(a) of the CISG should be made when the buyer has informed the seller of the state in which the goods will be used.²¹¹ This is, however, not a universal understanding. A multitude of scholars have also reached the opposite conclusion, in that the buyer may not simply inform the seller of the destination state for the goods and then expect the seller to ascertain and adhere to each and every standard existing in the destination state that might affect usability of the good there.²¹² To this regard, Professors Fritz Enderlein and Dietrich Maskow specifically stated that: "If the goods in the buyer's country or another country of destination have to meet special conditions, for instance with regard to the fulfilment of

²⁰⁶ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 513, para. 90

²⁰⁷ GH Arnhem, 27.4.1999

²⁰⁸ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 513, para. 91; Schlechtriem in 50 years of the BGH, Ch. IV; Schwenzer in Schlechtriem/Schwenzer, p. 580, para. 18

²⁰⁹ Schlechtriem in 50 years of the BGH, Ch. IV

²¹⁰ Ibid.

²¹¹ Schwenzer in Schlechtriem/Schwenzer, p. 580, para. 18

²¹² Bianca in Bianca/Bonell, pp. 274-275, para. 2.5.1 & p. 283, para. 3.2; Enderlein/Maskow, p. 144; Gillette/Ferrari, p. 7; Henschel, Ch. 4; Lookofsky, p. 92

specific test or security regulations, the seller has to take these into account only if the buyer informs him accordingly in advance."²¹³

The ultimate question then, in terms of whether or not the seller should conform to also the unique conditions of the destination state when the buyer has merely informed the seller of destination state, boils down to whether such notification suffices as a particular purpose pursuant to Article 35(2)(b) of the CISG. Multiple authors such as Professors Schlechtriem and Schwenger take that view,²¹⁴ but, in practice, courts have also found against that reasoning.²¹⁵ The author's opinion is that both the application of the three-point-analysis as provided by the German Supreme Court as well as the application of Article 35(2)(b) could be used to achieve a reasonable end result. As far as the author is concerned, Professor Schlechtriem's opinion that the notification of the destination state qualifies as a particular purpose is to be endorsed simply for the reason that Article 35(2)(b) provides courts and arbitral tribunals with more extensive rules to assess the situation.

Although the buyer may, at times, be in a better position in terms of informing the seller of any unique conditions prevailing in the destination state for the goods, those situations can effectively be answered by Article 35(2)(b), which requires that the buyer's reliance on the seller must be reasonable and justifiable.²¹⁶ In cases where the buyer is more equipped to assess the characteristics of the goods to be delivered, it would then not be reasonable for the buyer to simply rely on the seller to deliver suitable goods without appropriate discussions. Generally, however, the seller can reasonably be expected to inform itself of the conditions that exist in the destination state, especially when the seller is a multinational corporation with sufficient resources and when those conditions and standards are relative easy to ascertain. However, as regards Professors Schlechtriem's opinion that when a seller has been informed of a particular purpose in the sense that the goods are to be used in a specific country, the seller should automatically inform itself of all the conditions and standards that might affect the usability therein, the author's position is that courts and arbitral tribunals should be particularly careful in assessing whether it was truly reasonable for the buyer to rely on the seller. A strong presumption in this case that the seller should always be held responsible is not to be supported.

²¹³ Enderlein/Maskow, p. 144

²¹⁴ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 513, para. 91; Schlechtriem in 50 years of the BGH, Ch. IV; Schwenger in Schlechtriem/Schwenger, p. 580, para. 18;

²¹⁵ BGH, 8.3.1995; High Court of New Zealand, 30.7.2010

²¹⁶ Art. 35(2)(b) CISG

The aforementioned presumption might otherwise lead to a situation where the buyer is effectively aware of the conditions and standards it intends to rely on and is still entitled to rely on them in cases where the seller remained unaware of those factors. It is the author's view that such a conclusion would be unreasonable, as the buyer could easily have avoided the situation by informing the seller of those standards that it already had knowledge of. To this effect, the parties' expertise and knowledge of the conditions and standards of the destination are the crucial factors in determining whether the buyer should have specifically informed the seller of those standards or whether the seller should have ascertained that information by itself. Therefore, in cases of obscure standards that the seller could not have easily informed itself of, it would arguably not be reasonable for a buyer to rely on the seller to ascertain that information and, as a result, reliance on particular purpose pursuant to Article 35(2)(b) of the CISG would not be justifiable.

In any event, to avoid any uncertainties, buyers engaging in international purchases wishing to impose requirements that the destination state for the goods necessitates would be wise to stipulate those requirements in the contract document itself, or at the very least, inform the seller of those standards in a sufficiently clear manner. From a practical point of view, for any sellers operating in international trade, the general concept of better-safe-than-sorry should be followed. Sellers should inform themselves of any standards that might affect the marketability and usability of the goods in the destination state, insofar as this is within the reach of the seller's resources.

2.2 The Existence of a Particular Purpose in Accordance with Article 35(2)(b) and Justifiable Reliance on it

Article 35(2)(b) of the CISG states that "the goods do not conform with the contract unless they are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement."²¹⁷ It takes into consideration the known factor in international trade that the buyer will frequently not be able to explain and determine the mechanics and details that the goods it intends to purchase should contain. In those situations, the buyer typically then relies on the seller's greater knowledge to ascertain the expected

²¹⁷ Art. 35(2)(b) CISG

characteristics of the goods after having informed the seller of the purpose for which the goods will be used.²¹⁸

Article 35(2)(b) contains two prerequisites that must be fulfilled in order for a particular purpose to exist. First of all, a buyer must have, either expressly or impliedly, informed the seller of its specific and intended purpose for the goods to be purchased.²¹⁹ Second of all, the buyer must have actually relied on the seller to deliver suitable goods and such reliance must have been justifiable.²²⁰ In order to ascertain the actual scope of the article, both of those prerequisites will be thoroughly addressed in the following paragraphs.

2.2.1 Sufficient Notification

According to the text of the article, in order to be entitled to rely on a particular purpose for the goods, a buyer must inform the seller of that purpose in an adequate manner. The article does not require that the purpose is made expressly known, only that the seller can be reasonably expected to have become aware of that purpose. To this extent, the existence of an implicit notification of a particular purpose was examined in a case tried in the Supreme Court of Austria. The buyer wished to purchase scaffolding decks and scaffolding hooks. Upon the delivery of the goods, the buyer discovered that the shipped goods did not meet the requisite standards prevailing in Europe for such products nor were they safe for use. More specifically, the delivered scaffolding hooks could not be used to connect the scaffoldings in a safe manner. The seller, on the other hand, claimed that the delivered goods met all the prerequisites and standards in the seller's place of operation. Eventually, the Supreme Court stated that the buyer had impliedly made it known to the seller that the hooks were to be used in connection with certain scaffoldings and that European standards would be imposed on the goods. Taking these factors into consideration, the Court stated that the seller had impliedly been informed of a particular purpose for the scaffolding hooks that the goods delivered did not meet. Accordingly, the Court then found that the seller had breached the contract pursuant to Article 35(2)(b) of the CISG.²²¹ With regard to implicit notifications, Professor Ingeborg Schwenzer and Benjamin Leisinger also refer to situations where the

²¹⁸ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 518, para. 106

²¹⁹ Art. 35(2)(b) CISG

²²⁰ Ibid.

²²¹ OGH, 19.4.2007

buyer's name might be seen as sufficient in informing the seller of the purpose for which the goods will be used.²²²

It is worth noting that Article 35(2)(b) requires that any particular purpose that the buyer intends to rely on is conveyed to the seller before the conclusion of the contract.²²³ Any subsequent notification of a particular purpose is therefore not acceptable.²²⁴

With regard to a notification of a particular purpose, it is important to note that, in terms of Article 35(2)(b), the burden of a sufficient notification effectively falls on the buyer. Any statements or representations on the seller's part of the usability of the good are to be understood as contractual guarantees and part of the contract as an express term.²²⁵

In order to simplify this entire concept, an example may be given. A Finnish buyer wishes to purchase tires from a German tire merchant. The parties do not agree in the contract document on any express qualities that the tires are to fulfill. The buyer simply states that the tires will be used in the northern parts of Finland during winter conditions. In this scenario, the buyer has arguably informed the seller of the fact that the tires are to be usable on snow. As a result, in order to deliver goods that are in conformity with the contract, the seller must deliver tires that are usable in winter conditions and provide the necessary grip on snow. Only in a situation where it would be found that the buyer was not entitled to rely on the seller's skill and judgment to deliver suitable goods would reliance on this particular purpose be unjustifiable. That might be the case, for instance, when the seller is not a professional and not aware of the characteristics required for a tire to be usable on snow.

A standard situation for the application of a particular purpose would be a case where a buyer informs the seller of a certain need for which it requires the goods and the seller would then examine its inventory and choose the most suitable product for the buyer.²²⁶ To this effect, Professor Richard Hyland posits that situations where the buyer has specifically informed the seller of the intended purpose for the goods are not difficult to assess. In those scenarios, the seller is to deliver goods fit for that purpose or refuse concluding the contract.²²⁷ In his opinion, only the situations where the seller was not

²²² Schwenger/Leisinger, p. 267

²²³ Art. 35(2)(b) CISG

²²⁴ Enderlein/Maskow, p. 145

²²⁵ Bianca in Bianca/Bonell, p. 275, para. 2.5.2

²²⁶ Maley, p. 116

²²⁷ Hyland, p. 320; In agreement: Schwenger in Schlechtriem/Schwenger, p. 581, para. 22

aware of the buyer's intentions, even though it should have been, pose problems for courts and arbitral tribunals.²²⁸

Professor Hyland's opinion then goes into the core of Article 35(2)(b) of the CISG. A buyer that has sufficiently informed the seller of its particular purpose ensures that the seller can no longer argue otherwise. In those cases, the seller is to deliver goods that meet the buyer's expectations or face the consequences of nonconformity and, in that, a contractual violation. It then stands to reason that the problems witnessed in international cases fall within the borders where it is somewhat unclear whether the buyer sufficiently notified the seller of its purpose or not.

With regard to the previous portions of this text, an abundance of scholarly opinions, for example, support an argument that a buyer may not simply inform the seller of the destination state for the goods and then expect the seller to deliver goods that adhere to each and every requirement that particular country imposes on the goods.²²⁹ In their opinion, such a notification does not in itself fulfill the requirements of a sufficient notification of a particular purpose. As per above, this scenario has sparked much debate and differing opinions. To briefly reiterate previous sentiments, the author concurs with the opinion of Professors Peter Schlechtriem and Ingeborg Schwenzer in that a notification of the state in which the goods will, in actuality, be used suffices as a particular purpose pursuant to Article 35(2)(b). However, courts and arbitral should then carefully consider the circumstances of the case, that is, the expertise of the parties and the determinability of the relevant standards in order to determine whether the buyer should have provided more information to the seller regarding the conditions that prevail in the destination state or whether the seller should have ascertained that information itself. Only then can the court or arbitral tribunal decide whether the buyer truly relied on the seller's skill and judgment and whether such reliance reasonable in the first place.

In assessing whether the buyer has indeed adequately informed the seller of a particular purpose, regard is to be had to all relevant circumstances pursuant to Article 8(3) of the CISG.²³⁰ As a result, it is of some importance to then understand that the intended use of the goods need not be stipulated in the terms of a contract, but the buyer may inform the

²²⁸ Hyland, p. 320; In agreement: Schwenzer in Schlechtriem/Schwenzer, p. 581, para. 22

²²⁹ Bianca in Bianca/Bonell, pp. 274-275, para. 2.5.1 & p. 283, para. 3.2; Enderlein/Maskow, p. 144; Gillette/Ferrari, p. 7; Henschel, Ch. 4; Lookofsky, p. 92

²³⁰ Maley, pp. 117-118

seller of that purpose in any manner, so as long as this notification is done before the conclusion of the contract.

It is also important to note that a particular purpose may impose requirements on the goods even beyond their physical characteristics.²³¹ A buyer could then, for instance, inform the seller that the goods it intends to purchase are to be resold to consumers that are particularly motivated by ethical standards. That notification could then effectively require the seller to manufacture the goods in a certain manner.²³² To this effect, the seller would then have to ensure, for example, that no child labor be used in the production of the goods. If it later then becomes apparent that the seller did not comply with this requirement, the goods it produced would be unfit for the buyer's particular purpose for the goods, regardless of whether or not the goods themselves were free of any tangible defects.

In the end, the seller's actual knowledge of the buyer's particular purpose is irrelevant. In order for a particular purpose pursuant to Article 35(2)(b) of the CISG to exist, it is sufficient that the seller was in a position where it should have recognized the buyer's specific purpose for the goods.²³³ Buyers are then, as a result, protected from cases where the seller relies on its ignorance regarding the existence of any particular purpose. The buyer's position is assured by having made sufficient efforts to inform the seller of any particular purpose.

Regarding any particular purpose, the extent of the seller's duties is determined based on the amount of information that was available to the seller of that purpose.²³⁴ In order to simplify this assertion, reference to a previous example can be made. In the example, a buyer wished to purchase tires suitable for winter conditions. In a situation where the buyer was more thorough in explaining the goods that it requires, the seller's duties would be determined accordingly. The buyer could then have stated that the tires are to be usable in winter conditions, but, moreover, that the tires must not only be usable on snow, but that they are also to provide a necessary amount of grip on ice. Having made such an expectation clear, the seller should then arguably understand that the buyer is not expecting friction tires, but that the buyer instead wishes to purchase studded tires.

²³¹ Schwenger in Schlechtriem/Schwenger, p. 580, para. 20

²³² Maley, p. 117; Schwenger in Schlechtriem/Schwenger, p. 580, para. 20

²³³ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 518, para. 109; Maley, p. 118; Neumann, para. 43

²³⁴ Maley, p. 119

The extent of the information provided by the buyer was also under question in a case tried in the District Court of Regensburg in Germany.²³⁵ In that instance, the buyer had ordered fabrics from the seller to be used in the manufacture of textiles. At no point in time had the buyer particularly informed the seller of any specific use of the fabrics, the goods were requested simply to be used in the production of skirts and dresses. Following the delivery of the raw materials, the buyer claimed that the fabrics could not be used in an economical manner. According to the Court, the buyer was not entitled to expect fabrics of that nature, since it had not informed the seller of such a purpose. As a result, the Court then found no violation pursuant to Article 35(2)(b) of the CISG in that the seller had delivered goods unfit for the buyer's particular purpose.²³⁶ Similar reasoning was later applied by the District Court of Munich in a previously mentioned case, albeit to a different end result.²³⁷ In that particular case, the buyer had informed the seller that it wished to obtain globes that would be used for display purposes. The buyer specifically informed the seller of the fact that the globes ordered were intended for long term use. Accordingly, when the lifespan of the delivered globes proved far shorter than the buyer had expected, the Court found that the globes delivered by the seller were in violation of the parties' agreement pursuant to Article 35(2)(b) of the CISG. The buyer informed the seller of the expected durability of the goods in a sufficient manner.²³⁸

With regard to the above, it is then clear that a buyer, much like with contractual descriptions, reinforces its position in terms of Article 35(2)(b) by providing the seller with more information concerning its intended purpose for the goods. The information provided to the seller, coupled with the information that was otherwise available to the seller, then together determines the scope of the obligations of the seller as regards any particular purpose for the goods.

2.2.2 Actual and Reasonable Reliance on the Seller

In order for a particular purpose to exist for a buyer pursuant to Article 35(2)(b) of the CISG, there must be not only factual reliance on the seller by the buyer, but that reliance must also have been justifiable under the circumstances.²³⁹ With regard to actual reliance, it will arguably be easier to determine situations where it is clear that the buyer

²³⁵ LG Regensburg, 24.9.1998

²³⁶ Ibid.

²³⁷ LG München, 27.2.2002

²³⁸ Ibid.

²³⁹ Art. 35(2)(b) CISG

was not relying on the seller to assess the necessary characteristics.²⁴⁰ The aforementioned scenario could, for instance, be at hand when the seller suggests a certain product from its inventory but the buyer insists on a different one. The more extensive the buyer's part is in selecting the goods to be purchased, the likelier it is then that there was no reliance pursuant to Article 35(2)(b).²⁴¹

Multiple authors assert that it would be for the seller to prove that there was no actual reliance on the seller's skill and judgment.²⁴² That view is in accordance with the idea that a buyer does generally rely on the seller to receive goods that are suitable for the buyer's specific purpose.²⁴³ Accordingly, there is a presumption that the buyer did rely on the seller, having informed it of a particular purpose for the goods.²⁴⁴ That presumption is then for the seller to eliminate.

According to Professor Cesare Bianca, cases where the buyer did not rely on the seller's skill and judgment are impossible to enumerate in detail, but generally situations where the delivery does not occur under common terms in the trade and the circumstances are foreign to the seller any reliance on the seller's skill and judgment would likely be unreasonable.²⁴⁵ The same is generally true when the seller operates as a mere middleman.²⁴⁶

The reasonability of any reliance on the seller's skill and judgment is assessed on a case-by-case basis,²⁴⁷ but the most pertinent factors are, effectively, the parties' expertise regarding the goods in question and the knowledge of the parties as regards the actual intended purpose for the goods.²⁴⁸ Insofar as the seller is better equipped to assess the necessary characteristics of the goods for them to be suitable for the buyer's particular purpose, the buyer is, generally, entitled to rely on the seller to deliver suitable goods.²⁴⁹ On the other hand, in cases where the buyer can better assess and determine the qualities of the goods it expects to receive, reliance would generally not be justifiable.²⁵⁰

In terms of justifiable reliance, certain guidelines have been established in international case law. For instance, in a case tried in the High Court of New Zealand the issue

²⁴⁰ Enderlein/Maskow, p. 146

²⁴¹ Enderlein/Maskow, p. 146; Hyland, p. 321; Neumann, para. 9; Schwenger in Schlechtriem/Schwenger, p. 582, para. 24

²⁴² Enderlein/Maskow, p. 146; Honnold, p. 258, para. 226; Maley, p. 119

²⁴³ Bianca in Bianca/Bonell, p. 275, para. 2.5.3; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 521, p. 122

²⁴⁴ Maley, p. 119

²⁴⁵ Bianca in Bianca/Bonell, pp. 275-276, para. 2.5.3

²⁴⁶ Neumann, para. 9; Schwenger in Schlechtriem/Schwenger, p. 582, para. 24

²⁴⁷ Bianca in Bianca/Bonell, p. 275, para. 2.5.3; Maley, p. 119

²⁴⁸ Hyland, p. 322

²⁴⁹ Maley, p. 119

²⁵⁰ Maley, pp. 119-120

concerned the parties' knowledge of the destination state's registration requirements for imported trucks. The Court stated, in reference to the *New Zealand Mussels case*,²⁵¹ that the buyer possessed, or should have possessed, more knowledge with regard to the registration requirements, especially when the buyers were "experienced transport operators."²⁵² Accordingly, any reliance on the seller's skill and judgment would not have been reasonable pursuant to Article 35(2)(b) of the CISG. Whether or not one of the presented reasons would have sufficed by themselves is difficult to assess, but it is evident that the buyer's knowledge and expertise were of principal importance in assessing the reasonability of any reliance.

In another case tried in the District Court of Coburg, the Court also took into consideration the knowledge and expertise of the parties. According to the Court, the buyer was at least on par, if not more knowledgeable, with the seller in terms being capable of assessing the necessary attributes for the goods. As a result, the Court stated that it was not justifiable for the buyer to rely on the seller's skill and judgment.²⁵³

With regard to situations where the parties are equally capable of determining the necessary characteristics for the goods to be purchased, it is not entirely clear whether the buyer is indeed accorded the right to rely on the seller's skill and judgment. As per above, the District Court of Coburg held that the buyer should not be entitled to rely on the seller if the buyer is on level footing with the seller in terms of being able to specify the necessary qualities for the goods.²⁵⁴ Furthermore, Professor Stefan Kröll asserts that for as long as the buyer possesses 'sufficient' knowledge regarding the goods under purchase, reliance on the seller may no longer be justifiable.²⁵⁵ On the other hand, scholars such as Thomas Neumann are of the opinion that the buyer's knowledge of the goods is irrelevant, for as long as the buyer does not possess a greater level of knowledge regarding the usability of the goods.²⁵⁶ In any event, these scenarios should always be assessed as separate cases and, in this sense, it is perhaps better to not set in stone any unavoidable rules.

²⁵¹ BGH, 8.3.1995

²⁵² High Court of New Zealand, 30.7.2010

²⁵³ LG Coburg, 12.12.2006

²⁵⁴ Ibid.

²⁵⁵ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 521, paras. 123-124

²⁵⁶ Neumann, para. 9; See also Schwenger in Schlechtriem/Schwenger, p. 582, para. 24

2.3 The Goods Must Be of the Same Quality as the Sample or Model Presented to the Buyer

According to Article 35(2)(c) of the CISG, whenever the seller has presented a model or a sample of the good that the buyer is hoping to obtain before the purchase, the final good delivered to the buyer must be of equal quality with that model or sample.²⁵⁷ This is naturally a reasonable expectation. Having presented the buyer with a sample, the seller creates expectations on the buyer's part.²⁵⁸ Accordingly, the presentation of a sample or model then overrides any expectations based on the ordinary qualities and particular qualities expected pursuant to Articles 35(2)(a) and 35(2)(b) of the CISG should those expectations be in contradiction.²⁵⁹

To this effect, courts have, on various occasions, discovered a lack of conformity in the goods delivered, in that they did not meet the expectations of the buyer as established by the presented sample or model. The Appellate Court of Frankfurt, for example, held in a case that the shoes delivered by the seller were not in accordance with the originally presented sample. They appeared to have been manufactured in various manners and they were also visibly different from the original sample. Accordingly, the Court then found the goods to have been nonconforming. However, the existence of a fundamental breach, which would have justified avoidance, was excluded.²⁶⁰ In another case, the Federal District Court of New York found that the seller had delivered goods that were effectively not of the quality as the original sample had been. The delivered goods frequently malfunctioned and attempts to repair the defects were fruitless. Accordingly, the Court then found that the seller had violated the contract pursuant to Article 35(2)(c) of the CISG.²⁶¹

The extent to which the good ultimately delivered has to live up to with the presented model and sample may vary. The sample or model may have been presented to ensure the buyer that certain specific characteristics will be similar.²⁶² On the other hand, the seller may have made a number of reservations regarding certain qualities that the purchased good might not contain.²⁶³

²⁵⁷ Art. 35(2)(c) CISG

²⁵⁸ Honnold, pp. 258-259, para. 227

²⁵⁹ Bianca in Bianca/Bonell, p. 276, para. 2.6.1; Schwenger in Schlechtriem/Schwenger, p. 583, para. 26

²⁶⁰ OLG Frankfurt, 18.1.1994

²⁶¹ DC New York, 23.8.2006

²⁶² Kröll in Kröll/Mistelis/Perales Viscasillas, p. 523, para. 130

²⁶³ Ibid.

2.4 Packaging Requirements Imposed by Article 35(2)(d) of the CISG

The last and final prong in establishing conformity requirements is Article 35(2)(d) of the CISG, which requires that goods need to be packaged or otherwise contained in a suitable manner.²⁶⁴ The purpose of the article is to ensure that the buyer ultimately receives the goods in an acceptable condition.²⁶⁵ The seller's obligation to ensure proper delivery extends to the point in time when the buyer takes possession of the goods. However, even when the buyer is the party responsible for shipping the goods to the actual destination state, the seller is nevertheless the party that must ensure that the goods are packaged in manner that allows the buyer to simply load the goods onto a ship or aircraft and rely on the fact that the goods will remain in the same condition throughout the transportation.²⁶⁶

When determining the characteristics of 'appropriate packaging', one must refer to the usual manner in which goods of the same kind are packaged. Moreover, in the absence of any ordinary packaging, the goods must, at the very least, be packaged in manner that guarantees the delivery of the goods in an unharmed condition.²⁶⁷ In assessing the adequateness of the packaging, the seller must consider the transportation phase as a whole. The shipment might, for example, have to endure extreme climatic conditions.²⁶⁸

If the buyer later discovers that the goods have been damaged during the shipping phase due to defective packaging, the seller is then held liable for the damage caused.²⁶⁹ This sentiment is also supported by the verdict of the Appellate Court of Koblenz. In that instance, the buyer had already taken possession of the goods and arranged for re-shipment. However, the original packaging for the goods was lacking and due to these defects, the goods inevitably arrived damaged at its destination. Although the risk of nonconformity had already passed to the buyer pursuant to Article 36 of the CISG, the seller was nevertheless found to have delivered nonconforming goods to the buyer due to defective packaging.²⁷⁰

Insofar as damage has been done only to the packaging itself and the goods within have remained unharmed, the seller has upheld its part of the bargain. However, this is

²⁶⁴ Art. 35(2)(d) CISG

²⁶⁵ Bianca in Bianca/Bonell, pp. 276-277, para. 2.7.1; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 525, para. 137

²⁶⁶ Bianca in Bianca/Bonell, p. 277, para. 2.7.1

²⁶⁷ Bianca in Bianca/Bonell, p. 277, paras. 2.7.2-2.7.3; Kröll in Kröll/Mistelis/Perales Viscasillas, pp. 525-526, paras. 139-143; Schwenger in Schlechtriem/Schwenger, pp. 584-585, paras. 30-32

²⁶⁸ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 526, para. 141; Schwenger in Schlechtriem/Schwenger, p. 585, para. 32

²⁶⁹ Schwenger in Schlechtriem/Schwenger, p. 585, para. 32

²⁷⁰ OLG Koblenz, 14.12.2006

naturally only true to the extent that the goods themselves are not sold with the packaging included.²⁷¹

²⁷¹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 526, para. 144

Chapter 3

The Exclusion of Remedies Based on Party Knowledge Pursuant to Article 35(3) of the CISG

Article 35(3) excludes any liability on the seller's part due to any nonconformity according to Article 35(2) which the buyer either knew, or at the very least, could not have been unaware of.²⁷² The purpose of the article is apparent. Buyers can be seen as having agreed to the delivery of faulty or defective goods, if the buyer was aware of the defects and still decided to purchase them.²⁷³ In this situation, subsequent claims of nonconformity would be unreasonable at the very least. An ordinary situation for the application of the article would be a scenario where the buyer was given proper opportunity to examine the goods, following which, it deemed them acceptable and continued with the purchase.²⁷⁴ In this context, it is noteworthy that the CISG does not impose an obligation for buyers to examine the goods before the purchase. As such, Article 35(3) only becomes relevant in situations where the buyer has nevertheless examined the goods or when the buyer, due to other factors, should have become informed of the impending nonconformity.²⁷⁵ Due to the fact that actual knowledge of the buyer may be impossible to prove, Article 35(3) was included with a provision according to which even in a situation where the buyer 'could not have been unaware' of the nonconformity, it may not subsequently claim nonconformity pursuant to Article 35(2).²⁷⁶

In addition to situations in which the buyer has, due to whatever reason, examined the ordered goods before the purchase, the buyer could also have become informed of the nonconformity of the goods by other means.²⁷⁷ The parties could have discussed the quality of the goods prior to the purchase or the buyer could have purchased goods from the seller before and so forth. The price of the ordered goods is also, in the author's opinion, of some importance when determining the quality of the goods the buyer was entitled to expect. To this effect, Professor Ingeborg Schwenzer and Benjamin Leisinger, for example, assert that although a buyer may have required the observance of ethical values in the manufacture of the goods it ordered, if the purchase price was so

²⁷² Art. 35(3) CISG

²⁷³ Bianca in Bianca/Bonell, p. 278, para. 2.8.1; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 527, para. 149

²⁷⁴ Bianca in Bianca/Bonell, p. 278, para. 2.8.1

²⁷⁵ Lookofsky, p. 95, para. 171; Mullis in Huber/Mullis, p. 143; Schwenzer in Schlechtriem/Schwenzer, p. 587, para. 36

²⁷⁶ Henschel, Ch. 4.2

²⁷⁷ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 527, para. 150

low that the buyer had reason to believe that the seller could not have observed ethical standards, the buyer can then no longer rely on implied terms of the contract.²⁷⁸ Although Professor Schwenger was referring to usages pursuant to Article 9 of the CISG, in the author's opinion, the price of the goods is also a pertinent factor when assessing the applicability of Article 35(3) of the CISG. When the price is very low, the buyer can no longer expect goods of perfect quality.

While Article 35(2) and its various paragraphs are built to reinforce the position of the buyer, Article 35(3) is meant to activate in situations where the buyer neither needs nor deserves to rely on Article 35(2).²⁷⁹ The wording of Article 35(3) of the CISG makes it clear that it does not extend to obligations imposed on the seller by the use of express contractual terms pursuant to Article 35(1) of the CISG.²⁸⁰ That being the case, buyers could always rely on express contractual stipulations and subsequently claim nonconformity if the goods did not meet the contractual clauses. This would be the case even in situations where the buyer either was aware or could not have been unaware of the nonconformity at the time of the conclusion of the contract.

Scholarly opinions appear to unilaterally support the assertion that in no situation could Article 35(3) of the CISG be applicable in connection with express contractual requirements.²⁸¹ Nonetheless, in international case law, cases can be found where the buyer's knowledge of the defect has led to an exclusion of remedies pursuant to Article 35(3), even if the nonconformity concerned an express contractual clause.²⁸² For example, in a case tried in the Appellate Court of Canton in Switzerland, Article 35(3) of the CISG was deemed to be applicable, even when the nonconformity was due to a violation of an express contractual clause. The purchase concerned a used bulldozer that the buyer tested before concluding the contract. Moreover, the seller provided specific information to the buyer regarding the condition of the bulldozer. As a result, the Court found that the buyer had forfeited any rights to later claim the defective quality of the bulldozer.²⁸³

While the Norwegian suggestion on the application of Article 35(3) in connection with Article 35(1) was rejected during the drafting stage of the CISG, international case law does appear to support a limited application of Article 35(3) as regards express

²⁷⁸ Schwenger/Leisinger, p. 265

²⁷⁹ Henschel, Ch. 4.2; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 527, para. 149

²⁸⁰ Art. 35(3) CISG, this conclusion may be drawn as the article expressly states that it only applies to subsections a-d of the previous paragraph.

²⁸¹ Bianca in Bianca/Bonell, pp. 279-280, para. 2.9.2; Henschel, Ch. 4.2; Honnold, p. 260, para. 229

²⁸² AC Canton, 28.10.1997; OLG Köln, 21.5.1996

²⁸³ AC Canton, 28.10.1997

contractual clauses.²⁸⁴ Furthermore, scholar Thomas Neumann is of the opinion that the principle of good faith would appear to support such a conclusion.²⁸⁵

In the author's opinion, the position of the aforementioned courts is to be endorsed. The position of the buyer is supported by the use of multiple mechanisms. In cases where the buyer is effectively in the know regarding the goods to be delivered, there is no reason to differentiate between express contractual clauses and implied reasonable expectations pursuant to Article 35(2) of the CISG. Any other conclusion would leave a window open for buyers in international trade to purchase defective goods for low costs in the hopes of making some use of the purchased goods. That is, of course, reasonable. What is not reasonable is that when the buyer later changes its mind, it could still claim nonconformity due to defective quality even when the buyer purchased the goods knowing full well of the defects.

Naturally, the article does not cover situations where the defect was not discoverable to the buyer and became apparent only after the purchase.²⁸⁶ Accordingly, any and all purchase situations should be assessed individually to ascertain the extent of an appropriate examination by the buyer if there ever was one. The adequateness of any examination is generally determined on the basis of examinations that are usual in the branch of trade the buyer operates in.²⁸⁷ To this effect, it is important to note that in terms of bulk orders, the buyer is normally not obligated to examine the entire quantum of goods under purchase, but the buyer is, having examined a certain portion of the goods, entitled to expect that the rest of the delivery is of the same quality.²⁸⁸ In particular, the article is considered to be relevant when dealing with used goods.²⁸⁹

As is apparent from the text of the article, it is only applicable in situations where the buyer either knew of the impending nonconformity or when the buyer, due to the circumstances, 'could not have been unaware' of the said nonconformity.²⁹⁰ With regard to the wording 'could not have been unaware', it is seen to only apply in situations where the buyer has acted in an obviously careless manner. To this effect, scholar Thomas Neumann asserts that the phrase 'could not have been unaware' can be equated with

²⁸⁴ AC Canton, 28.10.1997; OLG Köln, 21.5.1996

²⁸⁵ Neumann, para. 53

²⁸⁶ Bianca in Bianca/Bonell, pp. 278-279, para. 2.8.2

²⁸⁷ Bianca in Bianca/Bonell, p. 279, para. 2.8.2

²⁸⁸ *Ibid.*

²⁸⁹ Henschel, Ch. 4.2; Schwenger in Schlechtriem/Schwenger, p. 586, para. 35

²⁹⁰ Art. 35(3) CISG

gross negligence on the buyer's part.²⁹¹ In these scenarios, it can then be assumed that by acting in a reasonable manner, the buyer would have effectively become aware of the nonconformity.

While the buyer may have acted in a careless manner and inevitably purchased defective goods, the buyer can still claim nonconformity of the delivered goods when the seller was also aware, or at the very least should have been aware, of the defects and effectively attempted to mislead the buyer.²⁹² This was established in a case tried in the Appellate Court of Köln in Germany. In that instance, both parties were experienced car dealers. The contract concerned the purchase of a car registered in 1992. Following the purchase, the buyer resold the car further to a third party. Eventually, it was discovered that the registration year of the car had, in fact, been 1990 and that the mileage on the car was far more than the odometer displayed. Even though the contract included a no warranty clause and the buyer could have discovered the nonconformity of the goods if it had properly inspected it, the Court found that the seller could not rely on Article 35(3) of the CISG, since the seller also had knowledge of the defects. The Court deemed that the seller had acted in a fraudulent manner and that, as a result, it should not be provided any protection pursuant to Article 35(3).²⁹³ The purpose of this sentiment is to protect unwary, even careless, buyers against sellers operating in bad faith. In this context, sellers that intentionally attempt to mislead buyers are not entitled to rely on Article 35(3) of the CISG. However, the line seems shaky at best. Arguably, if the Court found that the buyer had actual knowledge of the registration year and the mileage, the seller could have then relied on Article 35(3) of the CISG.

²⁹¹ Mullis in Huber/Mullis, p. 142; Neumann, para. 48; See also: Schwenger in Schlechtriem/Schwenger, p. 586, para. 35;

²⁹² OLG Köln, 21.5.1996; Schwenger in Schlechtriem/Schwenger, p. 587, para. 38

²⁹³ OLG Köln, 21.5.1996

Chapter 4

Additional Contractual Violations in Cases Where Nonconformity May Not Be Discovered

Under the CISG, certain remedies may be pursued even in situations where the delivered goods were, in fact, in conformity with the terms of the contract. To this effect, Article 45 of the CISG states that: "If the seller fails to perform *any of his obligations* under the contract or this Convention, the buyer may: [both] exercise the rights provided in articles 46 to 52 [and] claim damages as provided in articles 74 to 77."²⁹⁴ [*Italics added*] In this context, parties could agree on additional contractual obligations that must be adhered to that might not necessarily have anything to do with the condition of the delivered goods themselves. A buyer could, for example, require that the seller not use animal testing in its facilities. Although the seller might be able to provide the buyer with entirely perfect goods, the seller could be seen as having violated a contractual obligation if it then engaged in animal testing during the contractual relationship.

The application of the aforementioned separate contractual obligation can be witnessed in the previously cited case from the Appellate Court of Grenoble. In that case, the seller had made it specifically clear to the buyer that the goods were to be resold to either South America or Africa. By agreeing to conclude the contract, the buyer had then agreed to adhere to this obligation. Nevertheless, in the end, the buyer decided to resell the goods in Spain. Accordingly, the Court then found the buyer as having violated a contractual obligation and ordered the buyer to pay damages to the seller. Furthermore, the Court stated that the buyer's breach constituted a fundamental breach enabling the seller to avoid its contract with the buyer.²⁹⁵

In another instance, the parties agreed on the delivery of 130 pairs of shoes. The contract was to serve as a basis for further deliveries. Following the conclusion of the contract, the seller decided to present the shoes bearing the trademark of the buyer at a trade convention. By presenting the shoes and their design before the buyer itself, the seller injured the relationship between it and the buyer and, as a result, the buyer lost its interest in continuing a business relationship with the seller. Furthermore, the shoes

²⁹⁴ Art. 45(1) CISG

²⁹⁵ CA Grenoble, 22.2.1995

themselves were of limited worth to the buyer following their exposure. Accordingly, the Court found the seller to have violated a contractual obligation entitling the buyer to pursue both damages and avoidance of the contract.²⁹⁶

From the above, it is then apparent that both parties may insist on the incorporation of additional contractual obligations. It is recommendable to stipulate those expectations sufficiently clearly to ensure their later applicability. Especially any kind of behavioral requirements that do not fall within the usual expectations of the parties pursuant to the relevant articles of the CISG should be specifically addressed. As far as the buyer is concerned, it may, without any specific contractual clauses, expect goods that are usable for their ordinary purposes. The seller, on the other hand, may usually only expect that the buyer takes control of the goods upon delivery and pays the agreed upon sum. Any additional requirements need to be addressed, at the very least, in a certain manner. The extent to which a specific notification is required is dependent on the commonness of the expectation.

²⁹⁶ OLG Frankfurt, 17.9.1991

Chapter 5

Obligations of the Buyer upon the Delivery of the Goods

To be able to rely on Article 35 of the CISG when the seller has delivered nonconforming goods, the CISG imposes two separate obligations on the buyer. First of all, Article 38 of the CISG states that:

*The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.*²⁹⁷

Second of all, Article 39 of the CISG reads:

*The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.*²⁹⁸

Both the above obligations will now be discussed in turn to establish the full extent of the obligations of the buyer in connection with any nonconformity claims.

5.1 The Post-Delivery Obligation to Examine the Goods

The wording of Article 38 is quite simple to understand. The buyer is to examine the goods in as short a time as can reasonably be required. The presumption is that the buyer inspects the goods when the seller has completed its obligations in the delivery of the goods.²⁹⁹ In cases where the goods are transported by using third party operators, the examination requirement may be postponed until the buyer has actually acquired possession of the goods.³⁰⁰ The examination of the goods should then reveal possible discrepancies in the delivery, based on which a proper notification must be sent to the seller pursuant to Article 39 of the CISG.

²⁹⁷ Art. 38 CISG

²⁹⁸ Art. 39 CISG

²⁹⁹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 558, para. 2

³⁰⁰ Art. 38 CISG; Bianca in Bianca/Bonell, p. 299, para. 2.6; Schlechtriem (1986), p. 69

The purpose of the article is to protect the reasonable expectations of the seller. In cases where the buyer does not examine the goods and consequently cannot inform the seller adequately of any nonconformity, the seller can expect that the goods it delivered were, in fact, of the quality as the buyer expected to receive.³⁰¹ The examination of the goods should then reveal any defects that the goods might contain and enable the buyer to inform the seller accordingly.³⁰²

It is important to note that the buyer does not have to inspect the goods itself, but, as provided in Article 38, the buyer may choose any third parties to appropriately examine the delivery.³⁰³

When determining the appropriate methods for the inspection of the goods, unless the parties have agreed on certain standards, the rules of the state in which the goods were received apply.³⁰⁴ Moreover, in cases where no inspection standards exist, the buyer is expected to examine the goods in a manner that is reasonable under the circumstances.³⁰⁵ Accordingly, it is understood that, for example, in cases where the delivery concerns a bulk order or a delivery of highly technical products, the buyer is not expected to examine each and every good or to dismantle the product into pieces to inspect each part of the delivered good.³⁰⁶ The aforementioned falls inherently within the concept of reasonability - the application of which can be witnessed across the board when reading the text of the CISG.

To simplify the above reasoning, a buyer could have, for example, contracted with a seller for the delivery of a large quantum of bananas. Following the delivery, the buyer chooses boxes of the delivered goods at random to be examined to ensure that the goods were of the agreed quality. All of the boxes inspected by the buyer conform to the terms of the contract and are visibly of flawless quality. The buyer then reships the goods to a local supermarket. In the supermarket, it is discovered that one-fifth of the bananas delivered are covered in mold. In this case, the time for notifying the seller of the nonconformity would begin at the point in time when the nonconformity was discovered, not when the examination occurred, for as long as the buyer's initial examination can be deemed sufficient.

³⁰¹ Kuoppala, Ch. 2.4.2.1; Schlechtriem (1986), pp. 70-71

³⁰² Fiser-Sobot, p. 198; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 564, para. 27

³⁰³ Art. 38 CISG; Kuoppala, Ch. 3.2.1

³⁰⁴ Bianca in Bianca/Bonell, p. 297, para. 2.3; Fiser-Sobot, p. 204; Lookofsky, p. 103, para. 187

³⁰⁵ Bianca in Bianca/Bonell, p. 298, para. 2.3; Fiser-Sobot, p. 204; Kuoppala, Ch. 3.3.1; Lookofsky, p. 103, para. 187

³⁰⁶ Bianca in Bianca/Bonell, p. 298, para. 2.3

In cases where the nonconformity is of the quality that the buyer cannot reasonably have discovered, or when the nonconformity was effectively impossible to discover, the buyer is entitled to notify the seller upon having become informed of the nonconformity.³⁰⁷ However, it is important to note that the buyer's right to rely on any nonconformity expires, at the very latest, at the point in time where 2 years have passed from the delivery of the goods pursuant to Article 39(2) of the CISG.

Accordingly, cases can be found where courts have granted the buyer the right to pursue the nonconformity of the delivery even when much time has already elapsed since the buyer received the goods.³⁰⁸ In one case, for example, the Court found that the buyer could not, by means of a reasonable examination, have detected the nonconformity of the delivered fitness clothing. This was due to the fact that only a part of the delivered goods were faulty and the buyer could not reasonably be required to inspect each and every portion of a substantially large delivery. The buyer had then, being of the mindset that that it had received conforming goods, resold the goods further to consumers. The consumers later discovered defects in the goods. Upon being informed of the nonconformity of part of the delivery, the buyer subsequently informed the seller of the said defects. In the Court's opinion, the buyer notified the seller of the nonconformity in a reasonable time.³⁰⁹

On the other hand, it is important to recognize that the buyer itself bears the burden in having insufficiently examined the goods.³¹⁰ If the nonconformity was of the quality that the buyer ought to have discovered in its examination and some time has passed from the delivery, the buyer has then effectively lost its right to rely on the nonconformity in this instance.³¹¹ For example, in a case tried in the District Court of Aschaffenburg, the buyer simply relied on the expertise and integrity of the seller's manager without properly inspecting any of the 6 deliveries of the seller. When the goods later proved to be nonconforming, the Court found that the buyer had lost its right to rely on Article 35 of the CISG pursuant to Articles 38 and 39 because a reasonable examination of the goods would have informed the buyer of the defects in the goods.³¹² In another case, the buyer had received entirely defective goods, in that the shoes the buyer purchased were unhygienic and were otherwise in bad condition. However, the Court nevertheless deemed that the buyer had lost its right to rely on Article 35 since it

³⁰⁷ Bianca in Bianca/Bonell, p. 298, para. 2.4; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 560, para. 7; Kuoppala, Ch. 3.3.2

³⁰⁸ DC Zilina, 25.10.2007

³⁰⁹ Ibid.

³¹⁰ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 560, para. 8

³¹¹ Kuoppala, Ch. 3.3.2

³¹² LG Aschaffenburg, 20.4.2006

had taken over three weeks for the buyer to inspect the goods and a simple random examination of the goods upon receipt would have served to inform the buyer of their defectiveness.³¹³ In the author's view, the latter case is an extreme one and the conclusion might, at first glance, seem unreasonable. However, the fact that the contract concerned the delivery of second hand goods should be taken into consideration. Moreover, the case itself is meant to establish the crystal clear obligation of the buyer to inspect the delivered goods in a reasonable manner.

The examination of the goods upon their delivery serves a distinct purpose. It is to reveal any existing nonconformity in the delivered goods. The duty to inspect the delivered goods does not, however, stand alone. Article 38 of the CISG must always be read in conjunction with Article 39.³¹⁴ Accordingly, the purpose of Article 38 is to define the point in time based on which the reasonability of the timeliness of any nonconformity complaint will be assessed.³¹⁵ In order to successfully pursue any nonconformity in the seller's delivery, the buyer should then both examine the goods and inform the seller of any discovered nonconformity in due time.

5.2 The Obligation to Sufficiently Notify the Seller of the Nonconformity

In order to rely on Article 35 of the CISG, when the seller has delivered nonconforming goods, the CISG imposes an obligation on the buyer to inform the seller of that nonconformity.³¹⁶ Pursuant to Article 39, the buyer is expected to inform the seller of any nonconformity within a reasonable time of having become aware of the defectiveness in the goods.³¹⁷ In any event, the buyer loses the right to rely on the nonconformity if a notification is not given to the seller within two years of the delivery.³¹⁸

To be adequate, in addition to being sent within an acceptable period of time, the notification must also fulfill certain prerequisites content wise. The sent notice must, first of all, contain information regarding the discovered nonconformity.³¹⁹ Second of all, the notice must effectively include the buyer's specified disapproval of the

³¹³ LG Frankfurt, 11.4.2005

³¹⁴ Kuoppala, Ch. 2.4.1

³¹⁵ Ibid.

³¹⁶ Art. 39 CISG

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Schwenzer in Schlechtriem/Schwenzer, p. 624, para. 6

delivery.³²⁰ Accordingly, it is then insufficient that the buyer merely informs the seller of the discovered defect; the buyer must also inform the seller that it is not satisfied with the delivery.

Evidently, the purpose of the article is to protect the position of the seller and the expectations of the seller as to its reasonable expectations. This is due to the simple reason already provided earlier: When the buyer unreasonably delays in informing the seller of the nonconformity, the seller can justifiably understand that the goods it delivered were acceptable to the buyer.³²¹ However, both the timeliness and the sufficiency of a notification should be interpreted in light of the concept of reasonability. The purpose of Article 39 is not to impose artificial and 'overly burdensome' requirements on the buyer.³²²

In the following portion of the text, the notification requirement will be discussed both in terms of how detailed a notification should be and how soon can the buyer be expected to inform the seller of the discovered nonconformity.

5.2.1 The Specificity of the Notification

There is no general standard regarding how detailed a notification of nonconformity must be. Accordingly, the circumstances at hand and the positions of the parties must be taken into consideration when assessing whether or not a notification was, indeed, specific enough.³²³ It is important to recognize that the notification is meant to serve a specific purpose. It is intended to inform the seller of the fact that the delivered goods were not acceptable to the buyer and that the buyer is either hoping for the seller to remedy the defect itself, or to pursue the remedies that are available to it.³²⁴ To this effect, Professor Ingeborg Schwenzer asserts that the requirements for an adequate notification should not be overemphasized.³²⁵ As such, the notification would typically be adequate for as long as it conveys to the seller the buyer's unwillingness to accept the delivered goods in their current state and informs the seller of the discovered defects in a manner that enables the seller to consider the possibilities available to it.³²⁶ Admittedly, in order to consider whether the defect can be remedied by the seller itself, the notification given must contain a sufficient amount of information regarding the

³²⁰ Schwenzer in Schlechtriem/Schwenzer, p. 624, para. 6

³²¹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 598, para. 12

³²² Ibid.

³²³ Schwenzer in Schlechtriem/Schwenzer, p. 625, para. 7

³²⁴ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 597, para. 8; Schwenzer in Schlechtriem/Schwenzer, pp. 624-625, para. 6

³²⁵ Schwenzer in Schlechtriem/Schwenzer, p. 625, para. 6; See also, Kröll in Kröll/Mistelis/Perales Viscasillas, p. 604, para. 35

³²⁶ Enderlein/Maskow, p. 160; Honnold, pp. 278-279, para. 256; Kröll in Kröll/Mistelis/Perales Viscasillas, pp. 602-603, paras. 31-33; Kuoppala, Ch. 4.3.1; Sono in Bianca/Bonell, p. 309, para. 2.3

discovered nonconformity.³²⁷ Consequently, a notice that merely informs the seller of the buyer's discontent regarding the delivery but does not explain how the goods were defective cannot generally be seen as adequate.³²⁸ Regarding the specificity of a notification, the Appellate Court of Graz asserted that:

*The lack of conformity is considered to be sufficiently specified if the skilled seller knows what is meant; the notice must enable the seller to conduct a follow-up examination and to initiate the necessary steps for the removal of defects. However, the requirements for the description of the defect -- especially with regard to the radical legal consequences -- must not be overdrawn.*³²⁹

In connection with the above, the adequacy of a notification was, for example, explored in a case tried in the Appellate Court of Schleswig. In that instance, the buyer notified the seller that the received sheep were in bad physical condition. The buyer specified that the sheep, due to their physical state, were not in accordance with Danish regulations and that, as a result, the buyer could not use them. The Court found that these actions were sufficient to inform the seller that the buyer intended to return the sheep to the seller and avoid the contract.³³⁰ The opposite end result was reached by the District Court of Saarbrücken, when the buyer had simply informed the seller of the fact that consumers had complaints regarding the quality of the goods. According to the Court, such a notification does not fulfill the requirements for an acceptable notification, as it did not explain in any manner how the goods were factually defective.³³¹

It is submitted that a notification does not generally have to explain the discovered defect in a manner that requires no any additional investigation on the seller's part, for as long as the buyer explains what kind of consequences occurred as a result of the defect.³³² To this effect, the Appellate Court of Koblenz has stated that: "It suffices that the buyer describes the symptoms of the claimed defect. The buyer does not need to enquire into its causes."³³³ As per the above, however, a notification that merely states that consumers were not satisfied with the goods but does not explain why is usually insufficient.

When assessing the adequateness of any notification, multiple factors need to be considered. To this effect, the buyer being an expert, for example, could lead to a

³²⁷ Honnold, p. 279, para. 256; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 603, para. 33; Kuoppala, Ch. 4.3.1

³²⁸ Honnold, p. 279, para. 256; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 603, para. 34; Schwenzer in Schlechtriem/Schwenzer, p. 626, para. 7

³²⁹ OLG Graz, 11.3.1998

³³⁰ OLG Schleswig, 22.8.2002

³³¹ LG Saarbrücken, 2.7.2002

³³² Kröll in Kröll/Mistelis/Perales Viscasillas, p. 604, para. 35

³³³ OLG Koblenz, 14.12.2006

requirement of a more specific notification.³³⁴ Naturally, the characteristics of the goods and the nonconformity itself are also relevant.³³⁵ It stands to reason that the more difficult the defect is to assess, the less demanding the requirements for a notification regarding that defect should be. The expertise of the seller is likewise relevant. The more knowledgeable the seller is, the less information the seller should require to ascertain the nature of the nonconformity.³³⁶

As an additional factor, it is important to note that when numerous defects are discovered, the buyer is expected to notify the seller of each defect.³³⁷ As a result, buyers need to acknowledge that informing the seller of one defect does not provide the buyer the opportunity to pursue remedies regarding other defects if the seller was not accordingly informed.

In the author's view, it is important to understand that the notification is meant to inform the seller of the fact that the buyer is either hoping for the seller to take action or intending to pursue the various remedies offered by the CISG. The seller, on the other hand, should be informed to provide itself with the opportunity to take appropriate action. As such, for as long as the notification is given in a reasonable time and informs the seller of both the defectiveness of the goods and the intentions of the buyer, it should be seen as acceptable. The requisite specificity should be assessed on a case-by-case basis. The purpose behind Article 39 and the CISG itself do not support the supposition that the notification requirement should be interpreted too strictly.

5.2.2 The Timeliness of the Notification

Article 39 of the CISG calls for the buyer to inform the seller of any discovered nonconformity in the seller's delivery within a reasonable time.³³⁸ As an ultimate deadline the article requires that the seller is informed of any nonconformity, at the very latest, before 2 years has elapsed from the time of the delivery.³³⁹

The starting point, based on which the reasonability of the notice will be assessed, is the moment in time when the buyer becomes aware of the nonconformity or, alternatively, when the buyer should have become aware of it.³⁴⁰ Accordingly, the obligation of a

³³⁴ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 604, para. 37; Kuoppala, Ch. 4.3.1; Schwenger in Schlechtriem/Schwenger, pp. 625-626, para. 7

³³⁵ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 604, para. 37

³³⁶ Ibid.

³³⁷ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 606, para. 43; Schwenger in Schlechtriem/Schwenger, p. 627, para. 10

³³⁸ Art. 39(1) CISG

³³⁹ Art. 39(2) CISG

³⁴⁰ Enderlein/Maskow, p. 160; Girsberger, p. 242; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 610, para. 61; Kuoppala, Ch. 4.4.1.3; Sono in Bianca/Bonell, p. 309, para. 2.5

post-delivery examination pursuant to Article 38 of the CISG is of principal importance when determining the point in time when the buyer discovered or ought to have discovered the nonconformity.³⁴¹ Failing to appropriately inform the seller of the nonconformity in a reasonable time or, in any event, two years after the delivery, will consequently result in the buyer's inability to rely on any nonconformity in the seller's delivery.³⁴²

5.2.2.1 Notice within a Reasonable Time

It is submitted that the concept of a reasonable time, in terms of notifying the seller, is to be understood as a short period.³⁴³ On many occasions, it might even require the buyer to inform the seller immediately upon having discovered the nonconformity.³⁴⁴ Yet, while it is understood that the term 'reasonable time' refers to a short period of time, there is no uniform standard as to how long that 'reasonable time' really is. Accordingly, whether or not the buyer's notification was truly given within a reasonable time, is to be assessed on a case-by-case basis.³⁴⁵ To this effect, for example, whether or not the goods are perishable is to be taken into consideration.³⁴⁶

In terms of establishing a predictable and uniform timeframe for a notification, Professor Ingeborg Schwenzer suggested the application of a one month or 'noble month' -period.³⁴⁷ Professor Schwenzer's proposal has subsequently been endorsed by several court decisions³⁴⁸ and scholars such as Camilla Baasch-Andersen.³⁴⁹ Although, the purpose behind Professor Schwenzer's proposal appears to be reasonable, in practice, the concept of a 'reasonable time' has nevertheless varied tremendously and Professor Schwenzer's suggestion has, by no means, been uniformly accepted.³⁵⁰

For example, in the previously mentioned *New Zealand Mussels case*, the German Supreme Court took into consideration the jurisdictional backgrounds of the parties and consequently held the six weeks within which the buyer had notified the seller of the nonconformity as reasonable.³⁵¹ In another case, the Appellate Court of Karlsruhe held

³⁴¹ Honnold, p. 280, para. 257

³⁴² Honnold, p. 282, para. 259; Lookofsky, p. 105, para. 190

³⁴³ Enderlein/Maskow, p. 159

³⁴⁴ Enderlein/Maskow, p. 159; Lookofsky, p. 105, para. 190; See also Kröll in Kröll/Mistelis/Perales Viscasillas, p. 609, para. 55 in referring to international usages applicable in the trade of fresh fruits that impose an obligation on the buyer to inform the seller of any nonconformity within hours.

³⁴⁵ Sono in Bianca/Bonell, p. 309, para. 2.4; Girsberger, pp. 242-243; Kröll in Kröll/Mistelis/Perales Viscasillas, p. 609, para. 54; Kuoppala, Ch. 4.4.1.3; Lookofsky, p. 105, para. 190

³⁴⁶ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 614, para. 77; Kuoppala, Ch. 4.4.1.3

³⁴⁷ Girsberger, p. 243

³⁴⁸ BGH, 3.11.1999; BG, 13.11.2003; OG Luzern, 8.1.1997

³⁴⁹ Girsberger, p. 243

³⁵⁰ OLG Karlsruhe, 25.6.1997

³⁵¹ BGH, 8.3.1995

that even in the case of non-perishable goods, a notification of nonconformity should be sent to the seller within eight days.³⁵² Furthermore, the Commercial Court of Zürich has stated that regarding durable goods, a two week period for the buyer to notify the seller should be seen as sufficient.³⁵³

Professor Harry Flechtner was reluctant to provide any initial time span in ascertaining what constitutes as a 'reasonable time'. According to Professor Flechtner, the reasonability of the notice should be assessed based on whether or not the notice has caused any detriment to the seller. If none existed, the notification would have then been on time.³⁵⁴

While Professor Schwenger's suggestion of a standard period of time, based on which the reasonability of the notice would be assessed, would further the consistency and predictability of international verdicts and arbitral awards, international case law does not support the incorporation of a unilaterally applicable period for notice. The standard of one month would lead to unreasonable situations, for example, when the seller has delivered perishable goods that may have deteriorated to a point where they are entirely unusable if the buyer waits for a month to give notice of the discovered defect. When the delivery concerns perishable goods, a notice should be given promptly, at the very latest, within a few days.³⁵⁵

Professor Schwenger's proposition may be applied as a basis in determining the time within which a notification must be provided in the case of non-perishable, non-seasonal goods.³⁵⁶ Based on the circumstances of the case, that period could then be modified accordingly.³⁵⁷ However, in the author's opinion, it is questionable whether the buyer truly requires an entire month to provide the seller with a notification of a discovered defect. That could be the case when the defect requires a thorough analysis based on which the buyer could then inform the seller of the nonconformity in detail, but, in the author's view, a buyer does not generally require that long a period of time to notify the seller. Such a conclusion is also supported by an abundance of case law that has applied the period of notice rather strictly.³⁵⁸ In any event, whether or not courts apply an initial standard in the assessment of a reasonable time, the circumstances of the case are always of importance. Accordingly, it is then always within the discretion of

³⁵² OLG Karlsruhe, 25.6.1997

³⁵³ HG Zürich, 30.11.1998

³⁵⁴ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 615, para. 82

³⁵⁵ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 614, para. 77; Kuoppala, Ch. 4.4.1.3

³⁵⁶ Kuoppala, Ch. 4.4.1.3

³⁵⁷ Girsberger, p. 245

³⁵⁸ OLG Karlsruhe, 25.6.1997; HG Zürich, 30.11.1998

the court or arbitral tribunal to individually determine the acceptable time for a notification.³⁵⁹

From the above, a simple conclusion may be drawn as regards the obligations of the parties. First of all, the buyer is to examine the goods as soon as can reasonably be required. That examination is then used as a basis in assessing the reasonability of any notice of nonconformity given to the seller. While the author cannot provide for a specific period within which a notice must be given in order to maintain all remedies regarding a nonconforming delivery, an approximate period of two weeks should generally fall within the acceptable time frame. However, regarding perishable goods such as foodstuff, a notice must be provided earlier.

5.2.2.2 The Ultimate Deadline for a Notification

In order to protect the seller's position, Article 39(2) of the CISG was equipped with an ultimate notion that the buyer will lose all rights to rely on any nonconformity if the seller is not accordingly notified within two years after the delivery of the goods.³⁶⁰ This is true, regardless of whether or not it was even possible for the buyer to ascertain the nonconformity.³⁶¹ While the consequences of such an unavoidable obligation may, at times, seem drastic, the drafters of the CISG saw it fitting to provide contractual parties in international trade a certain measure of reliability and consistency.

However, as pointed out by Professor Girsberger, Article 39(2) of the CISG has never been applied in practice, where a buyer would have lost its right to rely on the discovered nonconformity due to the fact that the two year window had elapsed.³⁶²

³⁵⁹ Kröll in Kröll/Mistelis/Perales Viscasillas, p. 615, para. 83

³⁶⁰ Ziegel, Art. 39, para. 5

³⁶¹ Girsberger, p. 248; Kuoppala, Ch. 4.5.1

³⁶² Girsberger, p. 248

Chapter 6

Final Thoughts

The purpose of the research was to ascertain and explain the prevailing interpretations regarding a nonconforming delivery and additional contractual violations. The positions of the parties could then be thoroughly explained in order to provide for a text that might be used as a point of reference in that respect as well.

The assessment of what a party may rightfully expect from their contractual partner is primarily defined in the terms of the contract itself. Those expectations must be clarified in sufficient detail, but, in the end, parties are also protected through the concept of a reasonable person. For as long as those contractual expectations have been explained in a manner that a reasonable person in the counterparty's position would have accordingly understood them, the asserting party may justifiably expect adherence.

Any expectations regarding the conformity of the delivery are also protected by the supplementary definitions of conformity pursuant to Article 35(2) of the CISG. To this effect, Article 35(2) sets forth the basic expectations a buyer may have for the goods it intends to purchase. Those expectations are then automatically protected, unless otherwise agreed.

On the basis of a contractual violation, be it through the nonconformity of the delivered goods or through the violation of an additional contractual obligation not relating to the conformity of the delivery, the aggrieved party may choose to pursue the various remedies as provided by the CISG or the contract itself. However, it is important to remember that reliance on nonconformity on the buyer's part requires adherence to the obligations imposed by Articles 38 and 39 of the CISG, that is, a proper examination of the delivered goods and a sufficient and timely notification of the discovered nonconformity.

From international case law as well as recent scholarly opinions, it is evident that the drafters of the CISG were originally both unable to foresee all the potential issues that might arise in connection with the conformity of goods and unwilling to address certain issues that they left for courts and arbitral tribunals to resolve instead. As a result, the text of Article 35 is, at times, somewhat limited in answering all those issues, which

consequently leads to situations where the interpretation of the article is arguably being stretched to answer those issues.

Most of all, this is true in connection with the concept of quality pursuant to Article 35(1). In the understanding of a layman, quality would arguably refer to the tangible attributes of the goods, but recent sociological developments have led to a situation where the intangible characteristics for the goods have also become relevant. Due to this development, for instance, the origin of the goods and how a particular good was manufactured may be instrumental in assessing whether or not the seller delivered conforming goods. Evidently, courts and arbitral tribunals have seen it fitting to include these considerations into the concept of quality, whereby the seller may be seen as having violated the contract even if it delivered physically flawless goods.

In the author's view, however, the above is not an unreasonable development. The situations where the intangible qualities for the goods are of the essence to the buyer are not generally difficult to assess for the seller. For example, in scenarios where the buyer operates in a specific ethically-oriented market, any reasonable seller should understand that the goods it intends to purchase need to be manufactured in an ethical manner. These situations have become commonplace in today's world and need to be taken into consideration by the seller. In the same vein, the origin of the goods can also justifiably be of some importance to the buyer. Insofar as the seller can reasonably be expected to be aware of the buyer's expectations as regards such intangible qualities, there is no reason to treat these qualities in a different manner than physical qualities.

In terms of future application of Article 35, the contract document itself will obviously remain the principal tool in determining contractual obligations. The parties are to define the expected quality and quantity of the delivery in the contract itself. With regard to Article 35(1), the only portion of it that is subject to development is arguably the concept of quality. It is possible that the intangible qualities for the goods will obtain an increasing role in the determination of whether or not the seller's delivery was conforming. Although possibly foreign to a layman, for as long as that intangible characteristic is in one way or another attached to the goods themselves and their usability to the buyer, that intangible attribute can justifiably be a part of the quality determination pursuant to Article 35(1). Consequently, for example, the manner in which a certain good is manufactured may potentially become even more important in assessing whether or not the seller delivered conforming goods. Such a development is

already evident in international business. It can be witnessed in the growing importance placed on ethical and environmental standards. Presumably, parties will be even more active in the future in imposing these behavioral requirements on the counterparty.

As for Article 35(2), it is clear that it has operated as a safety-net of sorts in international trade. In the author's view, Article 35(2) and its supplementary definitions of conformity have been rather successful. Article 35(2) displays and protects the across-the-board principle of the CISG to protect the reasonable expectations of the counterparty. While the concept of reasonability may effectively evolve in the future, the wording of the article appears to be capable of adapting in accordance with such international developments. To this effect, if the understanding regarding the ordinary usage for a good changes, those new expectations are protected by way of Article 35(2)(a). Moreover, if the buyer informs the seller of a particular intention for the goods, the seller is to inform itself of the requirements imposed by that purpose pursuant to Article 35(2)(b). Accordingly, the author believes that Article 35(2) itself is articulated in a manner that enables it to adapt when necessary. In light of the ethical and environmental prospects presented above, the manner in which a good is manufactured can effectively become an ordinary expectation in the future. In this case, these expectations would already be protected by way of Article 35(2)(a) without any additional contractual definitions.

However, as regards any behavioral requirements, in the current situation the author urges any parties operating in international trade to incorporate specific contractual clauses into their contracts that require the counterparty to, for example, manufacture the goods in an ethical manner. It is also recommendable to accompany that clause with a sufficient contractual penalty clause. While such terms are increasingly utilized, they are not yet uniformly applied and in cases of ambiguity, misunderstandings may easily arise.